No. 10-895

In the Supreme Court of the United States

RAFAEL ARRIAZA GONZALEZ, PETITIONER

v.

RICK THALER, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal?

2. Was the application for a writ of habeas corpus out of time under 28 U.S.C. § 2244(d)(1) due to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"?

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STATEMENT

1. After a Texas jury convicted petitioner Rafael Gonzalez of murder, he appealed, claiming that the State had violated his speedy-trial rights. J.A. 208-234. On July 12, 2006, the Court of Appeals for the Fifth District of Texas rejected his speedy-trial claim and affirmed his conviction. J.A. 190-207; Pet. App. 2a. Gonzalez declined to file a petition for discretionary review with the Texas Court of Criminal Appeals (CCA), the State's highest court in criminal cases. *Ibid.* The window for filing that petition closed on August 11, 2006. *Ibid.* On September 26, 2006, the intermediate state court issued the mandate from its ruling affirming Gonzalez's conviction. J.A. 188-189; Pet. App. 2a.

2. On July 19, 2007, Gonzalez filed a state habeas application, presenting three new claims.

J.A. 69-86; Pet. App. 2a. First, he accused a state witness of lying to police and tampering with evidence. J.A. 76-77. Second, he accused his lawyers of ineffective assistance. *Id.* at 78-79. Third, he argued that the evidence was insufficient to support his conviction. *Id.* at 80-84. Gonzalez did not raise his speedy-trial claim in the state habeas application, see *id.* at 69-86, and the state habeas courts did not rule on it, see *id.* at 124-133. The state trial court denied habeas relief, and the CCA followed suit on November 21, 2007. *Id.* at 133.

3. On January 24, 2008, Gonzalez filed a federal habeas application. J.A. 134-146; Pet. App. 2a. Gonzalez raised four constitutional claims, including a speedy-trial claim. J.A. 142-145. Respondent Rick Thaler, Director of the Texas Department of Criminal Justice's Correctional Institutions Division (the Director), opposed federal habeas relief on several grounds, including untimeliness, failure to exhaust, and procedural default. Pet. App. 13a.

The federal habeas statute imposes a one-year statute of limitations. 28 U.S.C. 2244(d). For Gonzalez, this one-year clock started on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). The district court ruled that the limitations period began running on August 11, 2006—the date of "the expiration of the time for seeking [direct] review"—and dismissed Gonzalez's application as time-barred. Pet. App. 9a-21a.

Had the district court instead started the clock on September 26, 2006—the date on which the intermediate state court issued its mandate—Gonzalez's application would have been timely. But

Fifth Circuit precedent held that when prisoners fail to pursue direct appeals all the way to the Supreme Court of United States, the one-year clock must start at "the expiration of the time for seeking [direct] review." See *Roberts* v. *Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). The "conclusion of direct review" prong in section 2244(d)(1)(A) comes into play only "when the Supreme Court either rejects the petition for certiorari or rules on its merits." *Ibid.* The district court followed *Roberts* and dismissed the application.

4. Gonzalez filed a timely notice of appeal and requested a certificate of appealability (COA) from the district court. J.A. 155-158. The district court declined to issue a COA. *Id.* at 162-164. Gonzalez applied for a COA from the Fifth Circuit, raising only the statute-of-limitations issue and the speedy-trial claim. *Id.* at 175. A circuit judge approved Gonzalez's request to appeal, and issued a document stating (in pertinent part):

> A COA is GRANTED as to the question whether *Roberts* has been overruled by *Lawrence* [v. *Florida*, 549 U.S. 327 (2007)], and, if so, whether the habeas application was timely filed because Gonzalez's conviction became final, and thus the limitation period commenced, on the date the intermediate state appellate court issued its mandate.

J.A. 347.

This document fails to "indicate which specific issue or issues" amount to "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. 2253(c)(2)-(3). But the Director did not

object to this putative COA, and the Fifth Circuit entertained Gonzalez's appeal without discussing the document's noncompliance with section 2253(c).

5. On the merits, the Fifth Circuit reaffirmed *Roberts*, holding that when a habeas applicant fails to seek direct review from the State's highest court, the one-year limitations period always begins at "the expiration of the time for seeking [direct] review," rather than at "the conclusion of direct review." See Pet. App. 4a-8a. The Fifth Circuit's construction of section 2244(d) differs from the Eighth Circuit's opinion in *Riddle* v. *Kemna*, 523 F.3d 850 (8th Cir. 2008), which applies a later-in-time rule to the separate starting points described in section 2244(d)(1)(A). In the Eighth Circuit, a habeas applicant who fails to seek direct review from the State's highest court may start the one-year clock from either "the conclusion of direct review"—which the Eighth Circuit equates with the date on which the intermediate state court issues its mandate—or "the expiration of the time for seeking such review," whichever is later. See *id.* at 856. This Court granted certiorari.

SUMMARY OF ARGUMENT

Postconviction habeas proceedings impose enormous costs on the federal courts and on state governments. The COA mechanism controls these costs by screening out appeals that have no chance of success, and limiting appellate review to habeas applicants who make a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Faithful enforcement of these statutory and doctrinal limits on habeas appeals is essential to making federal postconviction review both cost-

effective and politically sustainable. Accordingly, this Court has regarded the COA as a jurisdictional prerequisite to an appeal. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 335-336 (2003).

But not every document that purports to authorize a habeas appeal will qualify as a "certificate of appealability" under section 2253(c). While section 2253(c)(1)(A) requires a state prisoner to obtain a "certificate of appealability" before he can appeal a denial of habeas relief, section 2253(c)(3) provides that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues" qualify as the substantial constitutional claim required by section 2253(c)(2). The document issued by the circuit judge in this case mentions only the statute-of-limitations issue; it does not indicate *any* constitutional claims. It therefore omits the one thing that Congress has declared that a COA "shall" contain. This document cannot qualify as a "certificate of appealability" under section 2253(c), and cannot confer appellate jurisdiction on the Fifth Circuit. It is as facially invalid as a purported "notice of appeal" that omits the names of the parties taking the appeal, see *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), or a purported "search warrant" that omits a description of the evidence to be seized, see *Groh* v. *Ramirez*, 540 U.S. 551 (2004).

Although the Fifth Circuit lacked jurisdiction over Gonzalez's appeal, it correctly applied the statute of limitations when it deemed Gonzalez's claims time-barred. Section 2244(d)(1)(A) provides two definitions of "finality": "the conclusion of direct review," and "the expiration of the time for seeking [direct] review." This dual definition of "finality" envisions two discrete categories of cases: those in

which direct review "concludes," and those in which the time for seeking direct review "expires." Gonzalez's case falls into the latter category because he refused to seek direct review in the CCA and allowed the time for seeking that review to "expire." Direct review "concludes," by contrast, when criminal defendants pursue direct review to its natural conclusion in the Supreme Court of the United States, rather than allow their time for direct appeals to expire before reaching this Court. Gonzalez's date of finality is therefore determined solely by the expiration-of-time prong in section 2244(d)(1)(A).

Gonzalez insists that courts must apply the later in time of these two definitions of finality, but Gonzalez misleads the Court by asserting that section 2244(d)(1)(A) defines "finality" by "the latest of" those two dates. Section 2244(d)(1) starts the one-year clock from "the latest of" the four dates provided by subsections 2244(d)(1)(A) through (D), but it does not define the date of "finality" in subsection (A) by the later of the two prongs listed within that subsection. Gonzalez's construction of section 2244(d)(1)(A) is also impossible to reconcile with this Court's opinions in *Clay* v. *United States*, 537 U.S. 522 (2003), and *Jimenez* v. *Quarterman*, 129 S. Ct. 681 (2009). Finally, Gonzalez's proposed interpretation will needlessly complicate the task of determining "the conclusion of direct review," by requiring federal habeas courts to apply state-law notions of finality that will vary among States and that may not be clear from the rulings of a state supreme court.

ARGUMENT

I. THE FIFTH CIRCUIT LACKED JURISDICTION TO ADJUDICATE GONZALEZ'S APPEAL

The circuit judge committed two errors in issuing the putative COA. J.A. 346-347. He first erred by failing to "indicate" a substantial constitutional claim in the document that purports to authorize Gonzalez's appeal. Section 2253(c)(1)(A) requires a state prisoner to obtain a "certificate of appealability" before appealing, and section 2253(c)(3) requires that "the certificate of appealability under paragraph (1) *shall indicate* which specific issue or issues" make a substantial showing of the denial of a constitutional right. (Emphasis added.) The document issued by the circuit judge in this case fails to indicate *any* constitutional claims, so it cannot qualify as a "certificate of appealability" under section 2253(c)—even though it purports to authorize Gonzalez's appeal. And the Fifth Circuit cannot assert jurisdiction over Gonzalez's appeal until a circuit justice or judge issues a "certificate of appealability," which the statute defines as a document that complies with section 2253(c)(3).

The circuit judge also erred by approving the COA application despite Gonzalez's failure to exhaust the only constitutional claim presented in his COA request. Gonzalez never presented his speedy-trial claim to the CCA, either on direct appeal or in the state habeas proceedings, and this failure to exhaust presents an insurmountable doctrinal obstacle to habeas relief. Even though Gonzalez believes that his speedy-trial claim presents a substantial constitutional issue, the requirement

that habeas applicants make a "substantial showing of the denial of a constitutional right" is only a necessary and not a sufficient condition to the issuance of a COA. See 28 U.S.C. 2253(c)(2); *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003). *Slack* and *Miller-El* compelled the circuit judge to deny a COA to Gonzalez unless reasonable jurists could debate whether "the petition should have been resolved in a different manner," and the Director's unassailable exhaustion defense precludes any judge from making that finding. *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336. But a circuit judge does not exceed his "jurisdiction" by granting a COA that he should have denied. A rule is "jurisdictional" only if it governs a court's adjudicatory capacity, and section 2253(c)(1) plainly authorizes "a circuit justice or judge" to decide whether to issue a COA. In this case, the circuit judge committed legal error by approving a COA request in the teeth of a doctrinal prohibition, but he did not exceed his jurisdiction, because he did not rule on something on which he had no prerogative to rule.

When the Court granted certiorari, it directed the parties to address the following question: "Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal?" *Gonzalez* v. *Thaler*, 131 S. Ct. 2989 (2011). Part I.A, *infra*, explains that the Fifth Circuit lacked jurisdiction to adjudicate Gonzalez's appeal. Part I.B, *infra*, explains that the circuit judge should not have issued the putative COA, but he did not exceed his jurisdiction with this erroneous legal decision. Part I.C, *infra*, explains how all of this informs the proper disposition of this case.

A. The Fifth Circuit Lacked Jurisdiction Over Gonzalez's Appeal Because The Circuit Judge Failed To Issue A "Certificate Of Appealability" Within The Meaning Of Section 2253(c)

Section 2253(c)(1)(A) requires a state prisoner to obtain a COA before he can appeal a district court's denial of habeas relief. See 28 U.S.C. 2253(c)(1)(A) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from[] the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court[.]"). Gonzalez concedes, as he must, that the issuance of a COA is a jurisdictional prerequisite to an appeal. Pet. Br. 14; see *Miller-El*, 537 U.S. at 336 ("[U]ntil a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.").

But a habeas applicant cannot establish appellate jurisdiction merely by obtaining a document that purports to authorize his appeal. Rather, he must secure a "certificate of appealability"—a legal term of art defined in section 2253(c). For a document to qualify as a "certificate of appealability," it must satisfy two criteria. First, it must be issued by "a circuit justice or judge." 28 U.S.C. 2253(c)(1). Second, it "shall indicate which specific issue or issues" make a substantial constitutional claim. 28 U.S.C. 2253(c)(3). A document that fails either of these requirements is not a "certificate of appealability" under section 2253(c)—even if it purports to authorize an appeal, and even if it calls itself a "certificate of appealability." The putative COA in this case fails the second of these requirements, so this Court should vacate the Fifth

Circuit's judgment and remand the cause with instructions to dismiss the appeal for lack of jurisdiction.

Before delving into the statutory text, we think it important to dispel the images of courtroom doors closing on the fingers of hapless litigants, images that Gonzalez and his amici repeatedly invoke in their briefs. Pet. Br. 12, 31-32; NACDL Amicus Br. 8. Gonzalez would have this Court believe that a jurisdictional dismissal of his appeal will cause anyone who obtains a defective COA to lose forever his opportunity to appeal an adverse habeas ruling. But no provision of law prevents a habeas applicant with a defective COA from securing a new COA and launching another appeal. And we do not seek any remedy from this Court that would foreclose applicants from seeking a new COA that complies with section 2253(c)(3) and then pursuing an appeal if they are able to obtain that document. If Gonzalez is unable to persuade a circuit justice or judge to issue a compliant COA, that will happen only because his constitutional claims are nonsubstantial, or because the Director's exhaustion argument (see Part I.B.2, *infra*) so clearly bars habeas relief that an appeal would be pointless—not because some circuit judge goofed by failing to indicate a constitutional claim in the first go-around.

1. The text and structure of the statute show that a document that fails to "indicate" a constitutional claim cannot qualify as a "certificate of appealability" under section 2253(c)

Gonzalez argues that the Fifth Circuit had jurisdiction over his appeal "because a circuit judge issued petitioner a certificate of appealability." Pet. Br. 14. That begs the question. The very issue in

this case is whether the document issued by the circuit judge qualifies as a "certificate of appealability" when it omits the one thing that Congress has declared a COA "shall" contain. Answering that question requires more than the conclusory assertions that Gonzalez offers throughout his brief, and analysis must begin with the text of section 2253(c):

> **(1)** *Unless a circuit justice or judge issues a certificate of appealability*, an appeal may not be taken to the court of appeals from—
>
> > **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > **(B)** the final order in a proceeding under section 2255.
>
> **(2)** A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> **(3)** *The certificate of appealability under paragraph (1) shall indicate* which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. 2253(c) (emphases added). Paragraph (1) establishes the basic rule: No jurisdiction exists over appeals by habeas applicants "[u]nless a circuit justice or judge issues a certificate of appealability." Paragraph (2) limits the circumstances under which a COA may issue: The applicant must, at an absolute minimum, make "a substantial showing of

the denial of a constitutional right." Finally, paragraph (3) requires that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy" paragraph (2).

Paragraph (1)'s jurisdictional rule makes clear that it is not enough for habeas applicants to obtain a piece of paper with the words "certificate of appealability." First, the COA must be issued by a "circuit justice or judge." A COA issued by a prisoner's cellmate would not confer appellate jurisdiction, even if it indicated a substantial constitutional claim. Second, paragraph (1) requires that the document *be* a "certificate of appealability." Gonzalez treats paragraph (1) as if it said, "Unless a circuit justice or judge issues *a document containing the words 'certificate of appealability*,'" or perhaps, "Unless a circuit justice or judge issues *a document purporting to authorize an appeal*." But that is not what paragraph (1) says. It calls for a "certificate of appealability," which is a legal term of art. Whether a particular document qualifies as a "certificate of appealability" is not to be determined by the nomenclature of the document, but by its content.

Paragraph (3) provides that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." At least two features of the statutory language demonstrate that this provision establishes a jurisdictional prerequisite to an appeal. First, in describing the contents of a COA, paragraph (3) refers back to paragraph (1), a provision that even Gonzalez concedes is phrased in jurisdictional terms. Pet. Br. 14 ("The plain text of AEDPA Section 2253(c)(1) makes the issuance of a certificate of appealability a jurisdictional

precondition to appellate review because it says that 'an appeal may not be taken' without it."). As paragraph (3) references paragraph (1)'s jurisdictional requirement, and specifically describes the COA required by that earlier paragraph, it is as though paragraph (1) had provided: "Unless a circuit justice or judge issues a certificate of appealability *that shall indicate the specific issue or issues that satisfy the showing required by paragraph (2)*, an appeal may not be taken to the court of appeals[.]" No different result should obtain because AEDPA's drafters made section 2253(c) more readable by breaking paragraph (3)'s requirement into a discrete provision that refers back to the jurisdictional rule established in paragraph (1).

The second important textual clue is the auxiliary verb "shall." By declaring that "[t]he certificate of appealability under paragraph (1) *shall indicate* which specific issue or issues satisfy the showing required by paragraph (2)," paragraph (3) defines the essential characteristic of a COA. Whenever one describes a legal concept or thing by saying it "shall" have a particular attribute, that attribute becomes a necessary condition for the concept or thing to exist. If a law provides that "an eligible voter *shall be* 18 years of age or older," the contrapositive follows as a matter of logic: Anyone who has not reached the age of 18 cannot be an eligible voter. Paragraph (3) is no different. When it provides that a COA under paragraph (1) "shall indicate" the specific issue or issues that satisfy the showing required by paragraph (2), the contrapositive is logically impossible to escape. A document that fails to indicate a substantial constitutional claim cannot

qualify as a "certificate of appealability under paragraph (1)."

Of course, context always matters when interpreting the word "shall." When Article II, section 3 of the Constitution says that the President "*shall* from time to time give the Congress Information of the State of the Union," that does not mean that a President who shirks this duty ceases to be President of the United States. But in this context "shall" is deployed as a command directed to a person; it is being used in an imperative rather than an existential sense. See U.S. Const. art. II, sec. 3 ("*He* shall from time to time give * * * ." (emphasis added)). When "shall" is used to describe the contents of a document, or the characteristics of a legal term of art, it cannot be passed off as mere exhortation. Gonzalez would have an easier time if paragraph (3) said, "*The circuit justice or judge who issues the certificate of appealability shall indicate* which specific issue or issues satisfy the showing required by paragraph (2)." But paragraph (3) is not phrased as a command to a judge; instead, it defines what a "certificate of appealability" is.

Gonzalez does not confront any of this statutory language when discussing paragraph (3) in his brief. See Pet. Br. 25-29. His analysis opens with an inaccurate paraphrase of the statute; he writes that "[s]ection 2253(c)(3) provides that, when issuing a certificate of appealability, *the court* 'shall indicate' which issues *it determined* to be eligible for appellate review." Pet. Br. 25 (emphases added); see also NACDL Amicus Br. 13 (describing paragraph (3) as "directed at the issuing judge"). But paragraph (3) is not phrased as a directive to judicial personnel. It describes what a "certificate of appealability" "shall"

contain. By changing the subject of paragraph (3) from the certificate to the court, Gonzalez is attempting to characterize the problem as mere human error rather than the failure of the *document* to meet the statutory definition of "certificate of appealability."

Having subordinated the text and structure of paragraph (3) to his careless paraphrase, Gonzalez offers four reasons for declining to treat paragraph (3)'s requirement as a precondition to appellate jurisdiction. His lead argument is that the verb "indicate" presents a "less stringent statutory directive than to identify or specify" and therefore "lacks the precision and specificity that would normally be associated with jurisdiction-defining directives." Pet. Br. 25-26. Yet paragraph (3) requires a COA to indicate the "*specific* issue or issues" that qualify as substantial constitutional claims. Apparently Gonzalez believes that a statutory requirement to "*specify* the issue or issues" would represent a jurisdictional prerequisite to an appeal, while a requirement to "*indicate which specific* issue or issues" does not. That paragraph (3)'s specificity requirement takes the form of an adjective rather than a verb hardly seems an issue of legal or jurisdictional significance.

In all events, we fail to see any causal relationship between the "precision and specificity" of a statutory provision and the jurisdiction-defining nature of that provision. The meaning of "arising under" federal law in 28 U.S.C. 1331 is notoriously vague and imprecise; courts and commentators have wrestled for more than a century over what this phrase means. See, *e.g.*, Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 Colum.

L. Rev. 157, 160-165 (1953). The requirement of a "final decision[]" before appeal in 28 U.S.C. 1291 is also imprecise in many regards. See, *e.g.*, *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 603-606 (2009) (discussing collateral-order doctrine). The test for whether section 2253(c)(3) is "jurisdictional" depends not on its "precision and specificity," but on whether the text and structure of that provision describe a limitation on a court's authority to resolve the merits on an appeal. Paragraph (3) satisfies this test by defining the essential attribute of a "certificate of appealability" and linking its requirement to the jurisdictional rule established in paragraph (1).

Gonzalez's second argument is that reviewing courts should overlook a putative COA's failure to mention a constitutional claim, by "construing the certificate as necessarily indicating the constitutional issue for which the petitioner made a 'substantial showing' in his application." Pet. Br. 27. This effectively reads section 2253(c)(3) out of the U.S. Code. If an appellate court can reach out to identify a "substantial" constitutional claim whenever the COA fails to do so, then section 2253(c)(3)'s requirement that the *certificate* identify the "specific" constitutional issues is no longer a requirement. The entire point of section 2253(c)(3) is to identify all substantial constitutional issues before an appeal is taken, to avoid wasting resources in litigation that cannot be expected to yield habeas relief. See *Slack*, 529 U.S. at 485 (noting that "[e]ach component of the § 2253(c) showing is part of a threshold inquiry"). Allowing the "indicat[ion]" to wait until the appeal is decided will induce the State to defend all claims out of an abundance of caution,

and force the reviewing court to consider all claims that the parties brief and argue before designating one or more constitutional claims as "substantial"—or perhaps designating none at all.

Gonzalez's proposal also spurns the statutory division of authority between the "circuit justice or judge" and the appellate-court panel that will decide the merits of the appeal. Under section 2253(c), the "circuit justice or judge" must decide whether a habeas applicant has made a "substantial showing of the denial of a constitutional right" *before* an appeal may be taken. After the COA issues, the merits panel decides only whether the substantial constitutional claims indicated in the COA merit habeas relief. Under Gonzalez's interpretation, the "circuit justice or judge" decides simply whether to authorize an appeal. If he issues a COA without flagging a substantial constitutional claim, the task falls to the merits panel to examine the entire record and determine in hindsight whether the "substantial showing of the denial of the constitutional right" requirement had been met. Gonzalez's approach to habeas appeals is doubly usurpative. It first allows the "circuit justice or judge" to authorize appeals in violation of section 2253(c). Then, after permitting those appeals to be taken, it allows the merits panel, rather than the "circuit justice or judge," to decide whether the appeal should have been allowed in the first place. This bears no resemblance to the arrangement that Congress established in section 2253(c).

Third, Gonzalez asserts that paragraph (3) fails to employ "jurisdictional terms." But paragraph (1) *is* phrased as a jurisdictional restriction, and paragraph (3) not only refers back to paragraph (1)

but also defines the characteristics of the legal term of art that appears in that jurisdictional provision. See 28 U.S.C. 2253(c)(3) ("*The certificate of appealability under paragraph (1)* shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." (emphasis added)). Gonzalez acknowledges that the language of paragraph (1) establishes a "jurisdictional precondition to appellate review," Pet. Br. 14, but he does not analyze the relationship between paragraphs (1) and (3), and he ignores the fact that paragraph (3) defines the very "certificate of appealability" that paragraph (1) requires as a jurisdictional prerequisite to an appeal.

Gonzalez also errs by describing paragraph (3) as a mere provision "intended for the guide of officers" that "do[es] not limit their power." Pet. Br. 28 (quoting *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)). As we have noted, the subject of paragraph (3) is the COA itself—not the judicial officer who decides whether to issue it. The timing rules in *Good*, by contrast, were statutory commands addressed specifically to officers. See, *e.g.*, 19 U.S.C. 1602 ("*It shall be the duty of any officer, agent, or other person* authorized by law to make seizures of merchandise or baggage * * * to report every such seizure * * * ." (emphasis added)); 19 U.S.C. 1603 ("*[I]t shall be the duty of the appropriate customs officer* to report promptly such seizure or violation * * * ." (emphasis added)); 19 U.S.C. 1604 ("*It shall be the duty of the Attorney General of the United States* immediately to inquire into the facts of cases reported to him * * * ." (emphasis added)). These provisions did not purport to describe the essential characteristic of a document

necessary for appellate jurisdiction. Section 2253(c)(3) does.

Finally, Gonzalez asserts that "nothing in subsection (c)(3) 'specif[ies] a consequence for noncompliance with' its dictate." Pet. Br. 28 (quoting *Dolan* v. *United States*, 130 S. Ct. 2533, 2539 (2010) (quoting *Good*, 510 U.S. at 63)). But paragraph (3) does not need to repeat the consequence previously spelled out in paragraph (1): If a habeas applicant does not obtain a "certificate of appealability"—one that "shall indicate" a substantial constitutional claim—then "an appeal may not be taken to the court of appeals."

Our jurisdictional contentions do *not* require courts to vacate or re-examine all wrongly issued COAs, but only those defective documents that omit the contents that "certificate[s] of appealability" are required to contain. The correctness of a COA's "substantial[ity]" finding is not an issue of jurisdictional significance, so long as the COA "indicate[s]" a specific finding of a "substantial showing of the denial of a constitutional right." See, *e.g.*, *Tiedeman* v. *Benson*, 122 F.3d 518, 522 (8th Cir. 1997) (vacating a putative COA for omitting the content required by section 2253(c)(3), while noting that a wrongly issued COA can nevertheless confer appellate jurisdiction "if regular on its face and not procedurally defective"). The concerns that our jurisdictional contentions will "waste[] judicial resources" are therefore overblown. NACDL Amicus Br. 12. The jurisdictional defects that we describe will be obvious on the face of the putative COA; enforcing section 2253(c)(3) will be no more wasteful or burdensome than enforcing the jurisdictionally mandated contents of a notice of appeal. See Part

I.A.2, *infra*. Some courts of appeals have echoed these concerns, but those courts fail to appreciate the distinction between reviewing the document's compliance with section 2253(c)(3) and reviewing a judge's earlier decision to issue a COA. See, *e.g.*, *Young* v. *United States*, 124 F.3d 794, 799 (7th Cir. 1997) (rejecting the notion that appellate-jurisdiction doctrines impose "[a]n obligation to determine *whether a certificate should have been issued*" (emphasis added)); *Soto* v. *United States*, 185 F.3d 48, 52 (2d Cir. 1999) ("[A] certificate of appealability *that is issued erroneously* nevertheless suffices to confer appellate jurisdiction under § 2253." (emphasis added)). In all events, none of those courts addressed the textual arguments we have presented for treating section 2253(c)(3) as a jurisdictional requirement, and the policy considerations on which those courts relied cannot prevail when the jurisdictional view represents the most plausible interpretation of statutory text and structure.

2. The required contents of a COA are no less "jurisdictional" than the required contents of a notice of appeal

The jurisdictional nature of section 2253(c)(3)'s requirement is confirmed by rulings from this Court regarding the contents of a notice of appeal. Like the COA, the notice of appeal serves as a jurisdictional prerequisite to an appeal. Without it, the federal courts of appeals lack jurisdiction and are powerless to take any action in a case. See, *e.g.*, *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982). And Rule 3(c)(1) of the Federal Rules of Appellate Procedure, like section 2253(c)(3), describes what a notice of appeal "must" contain:

> The notice of appeal must:
>
> > **(A)** specify the party or parties taking the appeal by naming each one in the caption or body of the notice * * * ;
> >
> > **(B)** designate the judgment, order, or part thereof being appealed; and
> >
> > **(C)** name the court to which the appeal is taken.

Fed. R. App. P. 3(c)(1). This Court has consistently held that a document that omits any of the contents required by Rule 3(c)(1) cannot serve as the "notice of appeal" needed to confer jurisdiction on a court of appeals. A purported "certificate of appealability" that lacks the content required by section 2253(c)(3) is no more capable of bestowing appellate jurisdiction.

In *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), for example, an appellant filed a putative notice of appeal that failed to include his name, due to a clerical error committed by his attorney's secretary. The Court held that this defect was fatal to appellate jurisdiction. See *id.* at 317 ("[P]etitioner failed to comply with the specificity requirement of Rule 3(c), even liberally construed. * * * Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal."). And in *Smith* v. *Barry*, 502 U.S. 244 (1992), the Court reiterated that *all* of the contents required by Rule 3(c)(1) represent jurisdictional prerequisites to an appeal. See *id.* at 248 ("Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review."). If Gonzalez maintains that section 2253(c)(3)'s requirement is nonjurisdictional,

then he must find some way to defeat this symmetry between the required contents of a COA and the required contents of a notice of appeal.

Although Gonzalez acknowledges *Torres* and *Smith*, he cites them for the following proposition:

> What is jurisdictionally critical is that a notice of appeal with the bare minimum of identifying information be timely filed. Other components, while required by rule, *see* Fed. R. App. P. 3(c), can be omitted without jurisdictional consequence. *See, e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316–17 (1988) (notice of appeal vests jurisdiction if it is "the functional equivalent of what the rule requires" and is therefore jurisdictionally sufficient); *accord Smith v. Barry*, 502 U.S. 244, 248 (1992).

Pet. Br. 23. Gonzalez's assertion that Rule 3(c)'s requirements "can be *omitted* without jurisdictional consequence," *ibid.* (emphasis added), is flatly contradicted by both *Torres* and *Smith*. Each of those decisions recognizes that courts should liberally construe the requirements of Rule 3 and accept documents that convey the "functional equivalent of what the rule requires." See *Torres*, 487 U.S. at 317; *Smith*, 502 U.S. at 248. But there is a chasm between that spirit of liberality and a license to *omit* information required by Rule 3 without jurisdictional consequence. See *Torres*, 487 U.S. at 317 ("[A]lthough a court may construe the Rules liberally in determining whether they have been complied with, *it may not waive the jurisdictional requirements* of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they

have not been met." (emphasis added)); *Smith*, 502 U.S. at 248 ("This principle of liberal construction does not, however, excuse noncompliance with the Rule. * * * Although courts should construe Rule 3 liberally when determining whether it has been complied with, *noncompliance is fatal to an appeal*." (emphasis added)). No amount of "liberal construction" can make Gonzalez's putative COA compliant with section 2253(c)(3). It does not mention *anything* resembling a specific constitutional issue, nor does it convey the "functional equivalent" of what section 2253(c)(3) requires.

Omitting the required content from a notice of appeal deprives the court of appeals of jurisdiction. Gonzalez's task is to explain why a different regime should govern COAs—not to assert that omissions from a notice of appeal lack jurisdictional significance when this Court's cases emphatically reject that notion.[1]

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[1] Other rulings from this Court have regarded omissions of required contents from jurisdictionally indispensable documents as fatal. See, *e.g.*, *Columbus Watch Co.* v. *Robbins*, 148 U.S. 266, 269-270 (1893) (dismissing certificate from a federal appellate court that sought to certify question, after finding the certificate "not in compliance with the statute" because it "does not specifically set forth the question or questions to be answered, and, apart from that, it does not state that instruction is desired for the proper decision of such question or questions"); *Waterville* v. *Van Slyke*, 116 U.S. 699, 700, 703-704 (1886) (dismissing a certificate of division of opinion because this Court "did not see that any distinct question of law is stated on which the judges differed").

3. A document that fails to "indicate" a constitutional claim cannot serve the evidentiary function of a COA

By requiring COAs to indicate a substantial constitutional claim, section 2253(c)(3) is designed to train the judge's attention on the constitutional issues in the case and provide written evidence that he found one or more them to be "substantial." Section 2253(c)(3) thus serves an evidentiary function much like the particular-description requirement of the Fourth Amendment's Warrant Clause. This Court has long held that the police must obtain a search warrant before searching a suspect's home, see *Payton* v. *New York*, 445 U.S. 573, 586 (1980), and the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched, and the persons or things to be seized*," U.S. Const. amend. IV (emphasis added). But when a magistrate issues a warrant that omits a particular description of the evidence sought, the Court treats the warrant as void and the search as warrantless—even if the warrant complies with the other constitutional requirements.

In *Groh* v. *Ramirez*, 540 U.S. 551 (2004), the warrant failed to provide any description of the type of evidence sought. *Id.* at 557. When police officers used this defective warrant to search a suspect's home, this Court held them liable for conducting a "warrantless" (and hence "unreasonable") search. The officers noted that the defective warrant was supported by probable cause and a sworn affidavit that described with particularity the items to be seized, and argued that their search was therefore

"functionally equivalent to a search authorized by a valid warrant." *Id.* at 558. But this Court would have none of it, refusing even to extend qualified immunity to the officers' actions:

> [T]he warrant did not describe the items to be seized *at all*. In this respect the warrant was *so obviously deficient that we must regard the search as "warrantless" within the meaning of our case law*.
>
> [* * *]
>
> [U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), *there can be no written assurance that the Magistrate actually found probable cause* to search for, and to seize, every item mentioned in the affidavit. * * * The mere fact that the Magistrate issued a warrant does not necessarily establish that he agreed that the scope of the search should be as broad as the affiant's request.

Id. at 558, 560-561 (second and third emphases added).

The omission of a constitutional claim from Gonzalez's putative COA is as fatal as the omission of a description of the evidence to be seized in the *Groh* search warrant. When a putative COA fails to identify *any* of the habeas applicant's constitutional claims, there is no "written assurance" that the judge who authorized the appeal even considered the minimum standard provided in section 2253(c)(2), just as there was no "written assurance" that the

magistrate in *Groh* found probable cause to search for the items mentioned in the affidavit. Courts cannot take it on faith that the circuit justice or judge deemed the constitutional claims in a prisoner's COA application "substantial," any more than the police can assume that a magistrate found probable cause to search for items mentioned in an officer's affidavit. And a document that lacks written evidence that "a circuit justice or judge" determined that an appeal presents a "substantial showing of the denial of a constitutional right" cannot confer jurisdiction on a federal appellate court, any more than a warrant that lacks written evidence that a magistrate found probable cause can insulate a police officer from a lawsuit.

B. The Circuit Judge Erred By Purporting To Issue A COA, But He Did Not Exceed His Jurisdiction

Section 2253(c)(2) provides that "[a] certificate of appealability *may* issue under paragraph (1) *only if* the applicant has made a substantial showing of the denial of a constitutional right." (Emphases added.) This "substantial showing" requirement is only the minimum showing necessary to obtain a COA—it does not entitle a litigant to a COA. Many habeas applicants, for example, can make "a substantial showing of the denial of a constitutional right" even when that constitutional claim encounters an insurmountable procedural obstacle. Yet this Court has long recognized that COAs should not issue in those situations. See, *e.g.*, *Slack*, 529 U.S. at 484; *Miller-El*, 537 U.S. at 336; cf. *Barefoot* v. *Estelle*, 463 U.S. 880, 893 & n.4 (1983).

Gonzalez asserts that his speedy-trial claim makes a "substantial showing of the denial of a

constitutional right," but he cannot obtain habeas relief on that claim because of his clear failure to exhaust. There is no point in allowing this appeal when jurists of reason would agree that Gonzalez has no chance of obtaining habeas relief on his constitutional claims—even though his case presents an interesting statute-of-limitations question.

Indeed, the need to preclude litigants such as Gonzalez from appealing serves the interests of not only the States but also prisoners. No one benefits when scarce judicial resources are diverted toward meritless habeas applications and siphoned away from inmates with serious claims of wrongful conviction. See *Brown* v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones."); Nancy J. King & Joseph L. Hoffmann, *Habeas for the Twenty-First Century* 81 (2011) (reporting that non-capital habeas has become a "costly charade" because the percentage of meritorious filings is "very close to zero").[2]

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[2] We are nonplussed that Gonzalez's amici, who assert a desire to "vindicate the rights of prisoners who may be actually innocent of the charges for which they were convicted," NACDL Amicus Br. 1-2, would want a regime in which Gonzalez could appeal his clearly unexhausted claim, a claim that cannot possibly lead to habeas relief and that will serve only to steer appellate-court resources away from prisoners with credible claims of innocence. See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 149 (1970) (reflecting that Justice Jackson's observation in *Brown* "may be distasteful but no judge can honestly deny it is real").

1. Under Slack *and* Miller-El*, a COA should not issue where a "substantial" constitutional claim is clearly barred on procedural grounds*

Slack forbids a judge to issue a COA if the district court denied relief on unassailable procedural grounds—even if the habeas applicant can satisfy section 2253(c)(2) by making a "substantial showing of the denial of a constitutional right." In cases where a district court denies habeas relief on procedural grounds, *Slack* requires that the applicant "show[], *at least*, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484 (emphases and bracketed numbers added). The first requirement represents the minimum showing required by section 2253(c)(2); the second requirement supplements section 2253(c)(2) by limiting COAs to applicants who demonstrate some prospect of ultimately obtaining habeas relief.

The facts of this case differ somewhat from *Slack*, because the district court did not rely on the exhaustion issue when it dismissed Gonzalez's habeas application. Instead, the district court opted to dismiss each of Gonzalez's claims on statute-of-limitations grounds. And given the divergent views of the Fifth and Eighth Circuits, it is safe to conclude that "jurists of reason" could debate the district court's application of the statute of limitations. But Gonzalez is wrong to assert that he can obtain a COA simply by combining this debatable statute-of-limitations issue with a debatable speedy-trial claim. Pet. Br. 13. *Slack* makes clear that its standard for

obtaining a COA represents a floor, not a ceiling—habeas applicants must "show[], *at least*," that reasonable jurists could debate the applicant's substantive constitutional claim as well as the grounds that the district court invoked for its procedural dismissal. *Slack*, 529 U.S. at 478, 484 (emphasis added).

Gonzalez quotes this passage from *Slack* but replaces the italicized language with ellipses. Pet. Br. 13. His efforts to conceal this inconvenient language are understandable, but a litigant's strategic omissions do not convert the *minimum* showing that *Slack* requires for a COA into an *entitlement* to a COA whenever the *Slack* criteria are satisfied. *Slack*'s holding rests instead on a broader proposition: That it is pointless to allow a habeas applicant to appeal a district court's ruling when the applicant has no chance of obtaining habeas relief on his "substantial" constitutional claims. See *Slack*, 529 U.S. at 474 (requiring applicant seeking a COA to show that "reasonable jurists could debate whether * * * *the petition should have been resolved in a different manner* or that the issues presented were 'adequate to deserve encouragement to proceed further'" (quoting *Barefoot*, 463 U.S. at 893 & n.4) (emphasis added)).

Miller-El reflects a similar approach to section 2253(c). When a federal habeas application presents claims that were previously decided by a state court, *Miller-El* instructs the circuit justice or judge to withhold a COA unless jurists of reason could debate the application of section 2254(d)'s relitigation bar to those claims. See *Miller-El*, 537 U.S. at 341 ("[W]e only ask whether the District Court's application of AEDPA deference, as stated in §§ 2254(d)(2) and

(e)(1), to petitioner's *Batson* claim was debatable among jurists of reason."); see also *id.* at 348-350 (Scalia, J., concurring) (defending on textual grounds "the Court's willingness to consider the [AEDPA] limits on habeas relief in deciding whether to issue a [COA]"). *Miller-El* recognizes that there is no sense in allowing an appeal if a provision of the federal habeas statute clearly precludes relief. As Justice Scalia explained:

> A circuit justice or judge must deny a COA, even when the habeas petitioner has made a substantial showing that his constitutional rights were violated, if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief. * * * This approach is consonant with *Slack*, in accord with the COA's purpose of preventing meritless habeas appeals, and compatible with the text of § 2253(c), which does not make the "substantial showing of the denial of a constitutional right" a sufficient condition for a COA.

Id. at 349-350 (Scalia, J., concurring) (citing *id.* at 336 (majority opinion)).

Slack and *Miller-El* require applicants seeking COAs to show that "reasonable jurists could debate whether * * * *the petition should have been resolved in a different manner* or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893 & n.4 (emphasis added)). This means that judges must deny COA requests whenever the prospects of obtaining habeas relief are

nil—either because the constitutional claim is not substantial, or because a substantial constitutional claim is clearly barred on procedural grounds. Cf. *Barefoot*, 463 U.S. at 894 (noting that courts should withhold permission to appeal when a prisoner's "claim is squarely foreclosed by statute, rule or authoritative court decision").

2. Gonzalez cannot obtain a COA on his speedy-trial claim because his failure to exhaust that claim is not debatable among jurists of reason

Gonzalez maintains that his speedy-trial claim makes a "substantial showing of the denial of a constitutional right." See Pet. Br. 15-20. But Gonzalez's effort to obtain habeas relief on the speedy-trial claim is a nonstarter because he never presented that claim to the CCA, as required by *Baldwin* v. *Reese*, 541 U.S. 27 (2004), and *O'Sullivan* v. *Boerckel*, 526 U.S. 838 (1999). Although Gonzalez did present the speedy-trial claim to the intermediate state court, he ceased his direct appeal without presenting this claim to the CCA. The speedy-trial claim is therefore unexhausted. See *Baldwin*, 541 U.S. at 29 (holding that exhaustion requires a state prisoner to "'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review)"); *O'Sullivan*, 526 U.S. at 847 (holding that exhaustion "requir[es] state prisoners to file petitions for discretionary review when that review is part of

the ordinary appellate review procedure in the State").[3]

Gonzalez tries to escape this exhaustion problem by claiming that he "raised" his speedy-trial claim before the CCA in his state habeas proceedings. See Pet. Br. 5; Cert. Reply 10-11. But the habeas application that Gonzalez filed in the CCA never mentions the speedy-trial issue. See J.A. 69-86. His state habeas application lists only three claims: (1) that a state witness lied to police and tampered with the evidence, *id.* at 76-77; (2) that his lawyers gave ineffective assistance, *id.* at 78-79; and (3) that there was insufficient evidence to convict, *id.* at 80-84. The State's response to Gonzalez's state habeas application discusses only those three claims. *Id.* at 99-105. When the state habeas courts denied relief, they addressed only those three claims. See *id.* at 124-133. And in his federal habeas application, Gonzalez listed those same three claims as the "Grounds Raised" in his state habeas application, along with a cryptic note about the speedy-trial claim that was not raised in his state habeas application. See *id.* at 138-139 ("NOTE: speedy trial violation on initial brief (answered by state) [sic]").

Gonzalez offers only two citations to support his assertion that he "raised" the speedy-trial claim in

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[3] Because the crux of the matter is "whether [Gonzalez] has *properly* exhausted," *O'Sullivan*, 526 U.S. at 848, this brief uses "exhaustion" terminology. To be precise, exhaustion doctrine obliged Gonzalez to petition the CCA for discretionary review of his speedy-trial claim, and the expiration of time for filing that petition means his claim is now exhausted but procedurally defaulted. *Ibid.*; *id.* at 853-854 (Stevens, J., dissenting).

the state habeas proceedings. See Pet. Br. 5 (citing J.A. 88, 106). But page 106 of the Joint Appendix is an excerpt of the intermediate state court's opinion *on direct appeal*; the State had attached that opinion as an appendix to its response to Gonzalez's state habeas application. As for page 88 of the Joint Appendix, that is an excerpt of Gonzalez's brief in the state habeas proceedings (not the habeas application itself), and it reads as follows:

> Previous Issues Presented For Review in
> Appellant's Brief No. 05-05-01140-CR
> In the fifth District Court of Appeals
> at Dallas, Texas
>
> I. The appellant was denied his Constitutional Right to a Speedy Trial.

J.A. 88. Gonzalez mentioned the speedy-trial claim in his state-court brief *only to declare that he had previously raised it on direct appeal*. Gonzalez never raised his speedy-trial claim in the state habeas proceedings, and he is mischaracterizing the record and misleading this Court by suggesting otherwise.

What's more, in Texas (as in most States), claims that prisoners raised and lost on direct appeal are generally precluded from relitigation in state habeas proceedings. See *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). Texas recognizes exceptions to this rule if "direct appeal cannot be expected to provide an adequate record to evaluate the claim in question," which is often true for claims involving ineffective assistance of counsel. *Ibid.* But this exception would not encompass Gonzalez's speedy-trial claim; his trial and appellate lawyers had every incentive to develop that claim on direct appeal (and they did). So even if Gonzalez had

asserted the speedy-trial issue for resolution by the state habeas courts, he *still* could not satisfy the exhaustion requirement because he has failed to present his claim "*in a procedurally proper manner* according to the rules of the state courts." *Dupuy* v. *Butler*, 837 F.2d 699, 702 (5th Cir. 1988) (per curiam) (emphasis added). Indeed, by describing the speedy-trial claim as a "Previous Issue[] Presented For Review," Gonzalez's state-court brief *admits* that the claim falls outside the scope of his state habeas application.

As a result, the only constitutional claim on which Gonzalez sought a COA—and the only constitutional claim that he asserts in this Court—is this unexhausted speedy-trial claim, on which Gonzalez has no hope of obtaining habeas relief even if his constitutional arguments are debatable among jurists of reason.

3. A circuit justice or judge would commit legal error by issuing a COA on Gonzalez's speedy-trial claim, but would not exceed jurisdictional limits

Slack and *Miller-El* establish that a circuit justice or judge should not issue a COA when an applicant, like Gonzalez, has no chance of obtaining habeas relief on his constitutional claims. But it does not follow that a circuit justice or judge lacks "jurisdiction" to issue a COA in this situation. A court can commit legal error without exceeding its jurisdiction, and a rule is "jurisdictional" only when it governs a court's adjudicatory capacity. See, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202-1203 (2011). There is a crucial distinction between a judge who decides a legal question incorrectly, and a judge who exceeds his "jurisdiction" by adjudicating an

issue that he had no prerogative to rule on one way or the other.

Slack and *Miller-El* restrict a judge's discretion to *grant* COAs, but they do not affect the prerogative of "a circuit justice or judge" to *consider and rule on* COA requests. Accordingly, a circuit justice or judge would not exceed his jurisdiction by issuing a COA in Gonzalez's case, even though he would commit legal error by doing so.

C. Based On The Answer To The First Question Presented, This Court Should Vacate The Fifth Circuit's Judgment And Remand With Instructions To Dismiss For Lack Of Jurisdiction, Without Reaching The Second Question Presented

The analysis in Parts I.A and I.B, *supra*, answers the first of the questions presented, as framed by the Court: "Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal?" *Gonzalez* v. *Thaler*, 131 S. Ct. 2989 (2011). The circuit judge had jurisdiction to issue a COA, although he should have denied Gonzalez's application for a COA. The Fifth Circuit, however, lacked jurisdiction to adjudicate Gonzalez's appeal.

1. This Court should not decide the statute-of-limitations issue because the Fifth Circuit lacked jurisdiction over Gonzalez's appeal

Where, as here, a federal court of appeals lacks jurisdiction, the proper disposition in this Court is to vacate the court of appeals's judgment and remand with instructions to dismiss the appeal. See, *e.g.*, *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 648 (2006); *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 549 (1986).

Gonzalez asserts that this Court should rule on the statute-of-limitations issue "regardless of the court of appeals' jurisdiction." Pet. Br. 32. This astonishing statement contradicts the most basic precepts of federal-court practice.

> Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. On every * * * appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation and internal quotation marks omitted). To ask this Court to reverse the court of appeals's judgment without first resolving that court's jurisdiction is to invite an act of dereliction and usurpation.

To be clear, this Court's jurisdiction to review the Fifth Circuit's judgment is secure under 28 U.S.C. 1254(1)—even if the Fifth Circuit lacked jurisdiction over Gonzalez's appeal. See, *e.g.*, *United States* v. *Corrick*, 298 U.S. 435, 440 (1936). A jurisdictional shortcoming in an inferior federal court does not deprive the *reviewing* court of jurisdiction, but it does limit the dispositions available to the reviewing court. If the court of appeals lacked jurisdiction to adjudicate an appeal, then this Court must order the appeal dismissed, and it may not proceed to the merits by assuming that appellate jurisdiction exists. See *Steel Co.*, 523 U.S. at 94-95, 101.

None of the cases that Gonzalez mentions support a contrary approach. In *Slack* and *Jimenez*, the

courts of appeals had refused to issue COAs to habeas applicants, and this Court granted certiorari to review those COA denials. There were no questions surrounding the courts of appeals' jurisdiction to rule on the COA requests, and this Court resolved disputed procedural questions because they were relevant to deciding whether the applicants were entitled to COAs. In the cases cited in footnote 9 of Gonzalez's brief, Pet. Br. 31, this Court resolved the merits without discussing or noticing the COA's noncompliance with section 2253(c)(3). At most, these cases might support Gonzalez's claim that noncompliance with section 2253(c)(3) should not be regarded as a "jurisdictional" shortcoming. But they cannot possibly support the notion that this Court can affirm or reverse the court of appeals's judgment without first establishing that the Fifth Circuit had jurisdiction over Gonzalez's appeal.

2. This Court cannot cure the jurisdictional defect in Gonzalez's case by issuing a new COA

Gonzalez asserts that this Court "can issue a certificate of appealability itself," and "could issue a corrected certificate for petitioner if that were deemed necessary to facilitate resolution of the important questions raised by his case." Pet Br. 30. The text of section 2253(c) does not support that view, and in all events Gonzalez's speedy-trial claim is undeserving of a COA because he cannot overcome his failure to exhaust.

Section 2253(c)(1) allows "a circuit justice or judge" to issue a COA; it does not confer this power on the Supreme Court of the United States. Although this Court may use its certiorari

jurisdiction to review and reverse decisions from the courts of appeals denying COA applications, see *Hohn* v. *United States*, 524 U.S. 236 (1998), that does not empower this Court to issue COAs on its own initiative. No one has petitioned for certiorari from the circuit judge's order granting Gonzalez's COA request, so this Court cannot affirm or reverse or modify that order. It can determine only whether that document was sufficient to empower the Fifth Circuit to consider Gonzalez's appeal.

Section 2253(c)(1) allows a single "circuit justice" to issue a COA, but this provision offers little help to Gonzalez. Even if the Circuit Justice for the Fifth Circuit were inclined to provide Gonzalez with a valid COA, that document could not retroactively confer appellate jurisdiction on the Fifth Circuit. The statute requires that an appeal be taken *after* the COA issues, not before. See 28 U.S.C. 2253(c)(1) ("*Unless* a circuit justice or judge issues a certificate of appealability, *an appeal may not be taken* to the court of appeals[.]" (emphases added)). If Gonzalez managed to obtain a new COA from a circuit justice or judge, this Court would still be obligated to vacate the Fifth Circuit's judgment and remand for a fresh set of proceedings in the court of appeals.

In all events, an after-the-fact attempt by Gonzalez to secure a valid COA would run headlong into the Director's unassailable exhaustion defense. See Part I.B.2, *supra*. And this exhaustion problem cannot be waived or forfeited unless the State's lawyers expressly relinquish that defense. See 28 U.S.C. 2254(b)(3). Gonzalez has no hope of obtaining habeas relief on his unexhausted speedy-trial claim, even if that claim is debatable among jurists of reason. *Slack* and *Miller-El* therefore preclude *any*

judge from issuing a COA to cure the Fifth Circuit's lack of appellate jurisdiction. See Part I.B.1, *supra*. The only thing left for this Court is to vacate the court of appeals's judgment and remand with instructions to dismiss the appeal.

II. GONZALEZ'S HABEAS APPLICATION IS TIME-BARRED UNDER 28 U.S.C. 2244(d)

If this Court concludes that the Fifth Circuit had jurisdiction over Gonzalez's appeal, then it will have authority to choose between the competing constructions of 28 U.S.C. 2244(d)(1)(A). The courts of appeals have adopted different methods for calculating the one-year limitations period when a habeas applicant failed to seek direct review in his State's highest court. Compare *Roberts* v. *Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003), with *Riddle* v. *Kemna*, 523 F.3d 850, 856 (8th Cir. 2008).

The text of section 2244(d)(1) provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

This case centers on the meaning of section 2244(d)(1)(A), which marks "the date on which the judgment became final" as a potential starting point for the one-year limitations period, and then establishes two prongs for determining when that date of finality occurs.

The Fifth Circuit holds that the "conclusion of direct review" prong applies only when the habeas applicant pursues direct review to its natural conclusion, by obtaining a judgment or a denial of certiorari from the Supreme Court of the United States. The "expiration of the time for seeking such review" prong governs all other cases—those in which the habeas applicant allows the time for seeking direct review to expire before reaching this Court. See *Roberts*, 319 F.3d at 694.

The Eighth Circuit, by contrast, applies a later-in-time rule to the two prongs of section 2244(d)(1)(A). If a state prisoner forgoes direct review in his State's highest court, the federal habeas court must determine *both* the date of "the expiration of the time for seeking [direct] review" and the date of the "conclusion of direct review," and

run the one-year clock from the later of those two dates. See *Riddle*, 523 F.3d at 856. Although it is not apparent from the statute how the "conclusion of direct review" might differ from "the expiration of the time for seeking such review" in these situations, the Eighth Circuit has equated the former prong with the date on which the intermediate state court issues its mandate. See *id.*

Gonzalez asks this Court to follow the Eighth Circuit's approach, and start his one-year clock on the date on which the intermediate state court issued its mandate. See Pet. Br. 32-50. But the Fifth Circuit's opinion in *Roberts* adopts a far superior construction of section 2244(d)(1)(A). First, the text and structure of section 2244(d)(1) favor the Fifth Circuit's interpretation over Gonzalez's. Second, Gonzalez's interpretation of section 2244(d)(1)(A) cannot be reconciled with the opinions in *Clay* v. *United States*, 537 U.S. 522 (2003), and *Jimenez* v. *Quarterman*, 129 S. Ct. 681 (2009). Third, the Fifth Circuit's approach simplifies the task for federal courts that must determine the meaning of "the conclusion of direct review."

A. The Text And Structure Of Section 2244(d)(1) Support The Fifth Circuit's Construction Of Section 2244(d)(1)(A)

Gonzalez and his amici insist that the "plain text" of section 2244(d)(1)(A) compels this Court to apply a later-in-time approach to the statute's alternate definitions of finality. Pet. Br. 32, 33, 40; NACDL Amicus Br. 3, 21. But this proposed construction of the statute finds support only in the "plain text" of Gonzalez's carefully redacted quotations of statutory

language. The actual text of section 2244(d)(1)(A) tells a different story.

Section 2244(d)(1) starts the one-year clock on "the latest of" the four "date[s]" listed in subsections (A) to (D). It does not equate the date of finality specified in subsection (A) with the *later* of the two prongs listed in that subsection. Gonzalez (once again) deploys ellipses to conceal this fact:

> As relevant here, AEDPA's one-year limitation period for the filing of habeas corpus petitions by state prisoners runs from "the latest of * * * the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

Pet. Br. 32 (omission and alteration in original). One needs only to glance at the text of section 2244(d)(1) to see that Gonzalez misleads the Court by implying that the phrase "the latest of" appears within subsection (A), when it in fact *precedes* subsection (A) and its accompanying subsections. Indeed, one does not even need to look up section 2244(d)(1) to realize that something is amiss with Gonzalez's edited quotation. Section 2244(d)(1)(A) contains only two prongs, yet Gonzalez would have us believe that the statute commands courts to apply "the *latest* of" (not "the *later* of") those *two* possible starting points. Pet. Br. 39 ("Congress has commanded that 'the latest of' the two [sic] controls."). For a statute supposedly written with "silk-purse clarity," *id.* at 10, that is a surprisingly awkward and ungrammatical circumlocution. And it is a bit rich that Gonzalez would accuse the Fifth Circuit of "pretending that

Section 2244(d)(1)(A) does not mean what it says," *id.* at 33, when he so transparently quotes the statute out of context throughout his brief.

The absence of any later-in-time language *within* subsection (A) dooms Gonzalez's textual argument. Section 2244(d)(1)(A) describes "*the date* on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"—a single date to be determined either by "the conclusion of direct review" or by "the expiration of the time for seeking such review." If AEDPA's drafters wanted to define this date of finality as the *later* of those two moments, they needed only to incorporate the last-in-time language that appears earlier in section 2244(d)(1), by defining the date in subsection (A) as "the date on which the judgment became final, *determined by the later of* the conclusion of direct review or the expiration of the time for seeking such review." Or they might have broken section 2244(d)(1) into five subsections rather than four, providing that "[t]he limitation period shall run from the latest of—***(A)*** *the date of the conclusion of direct review;* ***(B)*** *the date of the expiration of the time for seeking such review;"* and the three remaining subsections. Yet subsection (A) contains no indicia that its date of finality is to be determined by *the later of* the conclusion of direct review or the expiration of the time for seeking such review, and this omission becomes even more stark when section 2244(d)(1) uses explicit last-in-time language to choose among the four dates listed in subsections (A) to (D). Something other than the later-in-time rule must determine which of these two prongs controls the date of finality described in subsection (A).

The most sensible approach is the one adopted by the Fifth Circuit. In some cases direct review "concludes"; in other cases the time for seeking direct review "expires." The former category of cases includes those in which the defendant pursues his direct appeal all the way to its *natural* conclusion in the Supreme Court of the United States. In these cases finality is defined by the date of "the conclusion of direct review"—the date on which the Supreme Court of the United States denies certiorari or issues a judgment on direct appeal. The latter category includes the cases in which the defendant allows his time for seeking direct review to expire, and in these cases finality occurs on the date on which the defendant can no longer pursue direct appeals. Because Gonzalez allowed his direct appeals to "expire," without pursuing them to their "conclusion," his judgment became final at the expiration of time for seeking direct review, and his federal habeas application is therefore untimely.

On this view, the two prongs of subsection (A) do not compete with each other and force courts to resort to an arbitrary or atextual tiebreaker like the later-in-time rule. Rather, each of the prongs is designed to govern a discrete subset of cases. This approach makes subsection (A)'s failure to specify a tiebreaker between the alternate definitions of finality perfectly sensible. No tiebreaker needs to be provided in the statutory language because only one of those definitions will apply in any given case.

Gonzalez complains that this construction of subsection (A) "throws out half of the statutory text whenever review is not sought by a defendant in the State's highest court." Pet. Br. 39. But when a statute joins two clauses with the conjunction "or,"

there is nothing anomalous about one of these clauses dropping out in certain categories of cases. *Any* algorithm that chooses between subsection (A)'s two definitions of finality will cause the other prong to melt away in a defined subset of cases. Gonzalez might as well complain that his own proposal "throws out" subsection (A)'s expiration-of-time prong in all cases in which that moment predates the conclusion of direct review.

B. Gonzalez's Construction Of Section 2244(d)(1)(A) Is Irreconcilable With This Court's Decisions In *Clay* v. *United States* And *Jimenez* v. *Quarterman*

Clay v. *United States*, 537 U.S. 522 (2003), represents the federal-prisoner counterpart to this case. Clay was convicted in federal district court and appealed to the Seventh Circuit. After the federal court of appeals affirmed his conviction, Clay declined to continue his direct appeal by petitioning for certiorari. The time for seeking further direct review in this Court expired on February 22, 1999. But the Seventh Circuit issued its mandate two months earlier, on December 15, 1998. And although the statute of limitations for section 2255 motions largely tracks the provisions in section 2244(d)(1), there is one important difference: While section 2244(d)(1)(A) starts the one-year clock on "the date on which the judgment became final *by the conclusion of direct review or the expiration of the time for seeking such review*," section 2255(f)(1) defines its start date as simply "the date on which the judgment of conviction becomes final," without specifying when finality occurs.

Clay filed his section 2255 motion on February 22, 2000, exactly one year after the date on which the

time for seeking certiorari review expired. Unlike Gonzalez, Clay wanted the one-year clock to start on the date on which his time for seeking direct review expired, rather than the date on which the intermediate appellate court issued its mandate.

The Seventh Circuit rejected Clay's efforts to start the one-year clock from the date on which his time for seeking direct review expired. It held that when federal prisoners decline to petition for a writ of certiorari on direct appeal, the date of "finality" is the date on which the federal court of appeals issues its mandate. *Clay* v. *United States*, 30 F. App'x 607, 608-610 (7th Cir. 2002) (per curiam). This Court unanimously reversed, holding that "for federal criminal defendants who do not file a petition for certiorari with this Court on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires." *Clay*, 537 U.S. at 532.

Clay poses two insurmountable obstacles to Gonzalez's proposed construction of section 2244(d)(1)(A). First, *Clay* holds that the date of "finality" under section 2255(f)(1) will *always* occur at the expiration of the time for seeking direct review if the prisoner declines to seek a writ of certiorari on direct appeal.[4] Finality will never occur on the date on which the federal appellate court issues its

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[4] See *Clay*, 537 U.S. at 527 ("Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches 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.").

mandate on direct review, regardless of whether that date predates or postdates the expiration of time for seeking direct review. Accepting Gonzalez's argument would compel this Court to hold that section 2244(d)(1)(A)'s definition of "finality" differs from the meaning of "finality" in section 2255(f)(1). Yet *Clay* considered and rejected the notion that the differences in wording between sections 2244(d)(1)(A) and 2255(f)(1) imply any differences in meaning, see 537 U.S. at 528-531, and pointedly refused to "hold the § 2255 petitioner to a tighter time constraint than the petitioner governed by § 2244(d)(1)(A)," 537 U.S. at 529-530. Gonzalez's construction of section 2244(d)(1)(A) would do exactly that. Had Gonzalez been prosecuted in federal court, rather than state court, *Clay* would require the one-year limitations period to begin on the date of the expiration of time for seeking direct review, not the date on which the intermediate appellate court issued its mandate. Gonzalez believes he should be given more time than a similarly situated federal prisoner, solely because section 2244(d)(1)(A) defines "finality" as "the conclusion of direct review or the expiration of the time for seeking such review." But given that *Clay* explicitly rejected efforts to equate the "date of finality" with the date on which the mandate issues from an intermediate appellate court, it is impossible to read that rejected understanding of "finality" into section 2244(d)(1)(A), at least not without overruling this Court's longstanding insistence that section 2255(f)(1) tracks section 2244(d)(1)(A)'s definition of "finality." See *Clay*, 537 U.S. at 528-531.

Second, *Clay* explicitly rejects Gonzalez's efforts to incorporate state-law definitions of finality into 2244(d)(1)(A). In explaining its refusal to accord

different meanings to sections 2244(d)(1)(A) and 2255(f)(1), this Court wrote:

> [O]ne can readily comprehend why Congress might have found it appropriate to spell out the meaning of "final" in § 2244(d)(1)(A) but not in § 2255. Section 2244(d)(1) governs petitions by state prisoners. In that context, a bare reference to "became final" might have suggested that finality assessments should be made by reference to state-law rules that may differ from the general federal rule and vary from State to State. * * * *The words "by the conclusion of direct review or the expiration of the time for seeking such review" make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule.*

Clay, 537 U.S. at 530-531 (emphasis added). Given this passage, one can only marvel at Gonzalez's insistence that state-law definitions of "finality" must determine the meaning of "the conclusion of direct review" under section 2244(d)(1)(A). See Pet. Br. 33-37. Although Gonzalez cites *Clay* and acknowledges that section 2244(d)(1)(A) provides a "uniform federal" definition of finality, he nevertheless insists that "Congress did not dictate a uniform federal answer for when either prong of its two-part finality test is met" and that "those prongs draw their core meaning from state law, and turn to federal law if and when this Court's certiorari review comes into the picture." Pet. Br. 35-36. This notion of a "uniform federal rule" that incorporates state law by reference comes close to being an oxymoron—

and it is surely not what the *Clay* opinion meant when it described section 2244(d)(1)(A) as establishing a "uniform federal rule" for finality. Indeed, *Clay* stressed that section 2244(d)(1)(A) includes a specific definition of finality in order to *avoid* a regime in which finality is determined "by reference to state-law rules that may differ from the general federal rule and vary from State to State." *Clay*, 537 U.S. at 530-531.[5]

Jimenez v. *Quarterman*, 129 S. Ct. 681 (2009), presents an even greater doctrinal obstacle for Gonzalez, as it explicitly endorses the Fifth Circuit's construction of section 2244(d)(1)(A):

> With respect to postconviction relief for federal prisoners, this Court has held that the conclusion of direct review occurs when "this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari." [*Clay*, 537 U.S. at 527, 528-532] (interpreting § 2255, ¶ 6(1)). We have further held that if the federal prisoner chooses not to seek direct review in this Court, then the conviction becomes final when "the time for filing a certiorari

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[5] Some consideration of state law is unavoidable if the habeas applicant refused to seek direct review in his State's highest court. In those cases, the "expiration of the time for seeking [direct] review" can only be measured by state-law filing deadlines, rather than the certiorari-petition deadline. Gonzalez, however, advances a broader proposition, claiming that section 2244(d)(1)(A) incorporates state-law definitions of "finality" when it describes "the conclusion of direct review." That notion cannot be reconciled with *Clay*.

> petition expires." [*Clay*, 537 U.S. at 527]. *In construing the similar language of § 2244(d)(1)(A), we see no reason to depart from this settled understanding, which comports with the most natural reading of the statutory text.*

Jimenez, 129 S. Ct. at 685 (emphasis added). The *Jimenez* Court, like the Fifth Circuit, acknowledges two (and only two) moments at which "the conclusion of direct review" might occur: the date on which this Court "affirms a conviction on the merits on direct review" or the date on which it "denies a petition for a writ of certiorari." *Ibid.* And when a prisoner forgoes direct review in the Supreme Court, the conviction becomes final when the time for seeking direct review expires—regardless of whether the last appellate court issued its mandate before or after that date.

Gonzalez ignores this passage from *Jimenez*, and claims that *Jimenez* "require[s] resort to state-law rules to determine when the 'conclusion of direct review' occurs." Pet. Br. 37-38. But *Jimenez* never even applied the conclusion-of-direct-review prong of section 2244(d)(1)(A). Because the applicant in that case never sought a writ of certiorari on direct appeal, this Court looked exclusively to the "expiration of the time for seeking [direct] review" to determine the date of finality under section 2244(d)(1)(A)—just as the Fifth Circuit did in resolving Gonzalez's habeas application. See *Jimenez*, 129 S. Ct. at 686 ("Therefore, it was not until January 6, 2004, *when time for seeking certiorari review in this Court expired*, that petitioner's conviction became 'final' through 'the

conclusion of direct review or the expiration of the time for seeking such review' under § 2244(d)(1)(A)." (emphasis added)). The date on which the last state court issued its mandate was irrelevant to the Court that decided *Jimenez*.

Fortunately, the Fifth Circuit's construction of section 2244(d)(1)(A) avoids any tension with this Court's analysis in *Clay* and *Jimenez*. That fact alone should lead this Court to reject Gonzalez's contrary interpretation of the statute.

C. The Fifth Circuit's Construction Of Section 2244(d)(1)(A) Simplifies The Task For Courts That Must Determine "The Conclusion Of Direct Review"

The Fifth Circuit's approach in *Roberts* holds yet another advantage over Gonzalez's proposed later-in-time rule: ease of application. By sorting the cases in which the time for seeking direct review "expires" from those in which direct review "concludes," the Fifth Circuit provides a straightforward method for determining "the conclusion of direct review." It will occur on the date that the Supreme Court of the United States denies certiorari or affirms the criminal defendant's conviction. See, *e.g.*, *Clay*, 537 U.S. at 527 ("Finality attaches 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.").

Under Gonzalez's approach, by contrast, courts will have to determine "the conclusion of direct review" in *every* case, including the cases in which the habeas applicant allowed the time for seeking direct review to expire. Neither the statute nor this Court's precedent provides any guidance for determining "the conclusion of direct review" in these

situations. Gonzalez tacitly acknowledges this by arguing that courts should allow state law to define "the conclusion of direct review" in this subset of cases. Pet. Br. 33-46. But there are several problems with that proposal.

The first problem is that section 2244(d)(1)(A) makes no mention of state law, and contains no language purporting to incorporate state-law notions of finality. It would have been easy enough for AEDPA's drafters to incorporate these state-law standards into section 2244(d)(1)(A); they could have started the one-year clock on "the date on which the judgment became final by the conclusion of direct review *under state law* or the expiration of the time for seeking such review." But they did not do so, and this failure to mention state law contrasts with other provisions in the federal habeas statute that explicitly incorporate state-law standards. See, *e.g.*, 28 U.S.C. 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, *if he has the right under the law of the State* to raise, by any available procedure, the question presented." (emphasis added)). We are at a loss to understand Gonzalez's ringing assertion that "[t]he plain textual meaning [of section 2244(d)(1)(A)] incorporates state law." Pet. Br. 33.

The second problem is that state law does *not* determine "the conclusion of direct review" when a criminal defendant pursues his direct appeals to the Supreme Court of the United States. If a defendant petitions for a writ of certiorari on direct review, then the expiration-of-time prong in section 2244(d)(1)(A) is inapplicable, and the date of finality must be determined solely by "the conclusion of

direct review." But in these cases, the meaning of "the conclusion of direct review" rests squarely on the precedents of this Court, which provide a uniform, federal-law definition: the date on which this Court denies certiorari or affirms the conviction on direct appeal. See *Clay*, 537 U.S. at 527 (collecting authorities); *Jimenez*, 129 S. Ct. at 685. As Gonzalez does not ask this Court to overrule the decisions applying this federal-law definition of "the conclusion of direct review," we must conclude that Gonzalez is advancing a more limited proposition: That the federal-law precedents of this Court should define "the conclusion of direct review" when a criminal defendant pursues his direct appeals to this Court, but that state law should define "the conclusion of direct review" in all other cases.

The third problem is that Gonzalez would require federal habeas courts to determine how state law defines "the conclusion of direct review." That is an unenviable task, as state-law systems adopt many different definitions of "finality," and state-law understandings of "finality" may not always equate with "the conclusion of direct review." See, *e.g.*, *Clay*, 537 U.S. at 527 ("Finality is variously defined; like many legal terms, its precise meaning depends on context."). Gonzalez acknowledges that only 27 States have equated the "conclusion of direct review" with the issuance of a state court's mandate; the other States either have adopted different understandings of finality or else have not provided clear guidance. Pet. Br. 47. A state supreme court's precedent will not always be clear on when "direct review" concludes in particular situations, which could lead federal habeas courts to certify state-law

questions, further delaying the federal postconviction review process.[6]

The Fifth Circuit's approach simplifies the statute-of-limitations inquiry: If the habeas applicant allowed his time for seeking direct review to expire, then start the one-year clock on the expiration date. Otherwise, start the one-year clock at "the conclusion of direct review," defined as the date on which the Supreme Court of the United States either denied certiorari or affirmed the conviction. There is no need to traipse through state-court opinions or divine how a state supreme court might determine the "conclusion of direct review" in any particular case. And there is little point in saddling the federal habeas courts with these added responsibilities when section 2244(d)(1)(A) makes no mention or allusion to state-law standards of finality, and when this Court has declared that "finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a *uniform federal rule*" rather than "state-law rules that may differ from the general federal rule and vary from State to State." *Clay*, 537 U.S. at 530-531 (emphasis added).

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[6] Gonzalez insists that the issuance of the mandate determines finality under Texas law, Pet. Br. 33, but that is far from clear. The Texas Supreme Court and the CCA are apparently divided over whether the mandate determines finality under Texas Rule of Appellate Procedure 18.1. Compare *Ex parte Johnson*, 12 S.W.3d 472, 473 (Tex. Crim. App. 2000) ("Prior to the mandate, a judgment is not final."), with *Edwards Aquifer Auth.* v. *Chem. Lime, Ltd.*, 291 S.W.3d 392, 411 (Tex. 2009) (Brister, J., concurring) ("[M]andates issue 10 days *after* our judgment is final * * * . * * * The problem is that it is hard to say when our decisions are final.").

In the alternative, Gonzalez asks this Court to equate the "conclusion of direct review," as a matter of federal law, with the date on which the state appellate court issues its mandate. Pet. Br. 47-50. (Presumably this proposed definition would apply only in the cases where the defendant declined to seek further review in the state supreme court or in the Supreme Court of the United States.) Although this date would be easier for courts to determine than the date of "finality" under state law, the proposal still rests on Gonzalez's dubious later-in-time (or "latest"-in-time?) construction of section 2244(d)(1)(A)—an interpretation that finds no support in the statutory language or structure and that cannot be squared with this Court's opinions in *Clay* or *Jimenez*.[7] Neither of Gonzalez's proposed constructions of the "conclusion of direct review" can overcome those statutory and doctrinal obstacles to extending that phrase beyond the cases in which the criminal defendant pursued his direct appeals to conclusion in this Court.

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[7] *Lawrence* v. *Florida*, 549 U.S. 327 (2007), is no help to Gonzalez. That case involved the period of statutory tolling under 28 U.S.C. 2244(d)(2), not the definition of finality in 28 U.S.C. 2244(d)(1)(A). And the parties in *Lawrence* had *stipulated* that the issuance of the state supreme court's mandate marked the end of the statutory tolling period, so this Court had no occasion to rule on the significance of the issuance of the mandate. 549 U.S. at 331 ("[T]he parties agree that AEDPA's limitations period was tolled from the filing of Lawrence's petition for state postconviction relief until the Florida Supreme Court issued its mandate affirming the denial of that petition.").

D. Gonzalez Does Not Enjoy The Benefit Of The 90-Day Period For Filing A Certiorari Petition

Gonzalez's last-ditch argument is that the Fifth Circuit erred by equating the "expiration of the time for seeking direct review" with August 11, 2006—the last day on which Gonzalez could have petitioned the CCA for discretionary review of his judgment on direct appeal. Gonzalez thinks he should get an extra 90 days, because he claims that he might have petitioned this Court for a writ of certiorari even after spurning his opportunity to continue his direct appeal in the State's highest criminal court.

This Court would lack jurisdiction to review the intermediate state court's judgment on Gonzalez's hypothetical certiorari petition. Under 28 U.S.C. 1257(a), this Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Gonzalez did not petition the CCA, Texas's highest court in criminal cases, for discretionary review after the intermediate state court affirmed his conviction. Therefore, the intermediate state court's judgment cannot qualify as a "[f]inal judgment[] * * * rendered by the highest court of a State in which a decision could be had," and this Court lacks jurisdiction to review it. See, *e.g.*, *Costarelli* v. *Massachusetts*, 421 U.S. 193, 195-197 (1975) (per curiam); *Banks* v. *California*, 395 U.S. 708, 708 (1969) (per curiam).

Gonzalez does not even attempt to argue that section 1257(a) would have allowed him to petition for certiorari after forgoing direct review in the CCA. Instead, he notes that section 1257(a) allows *other* litigants to petition for certiorari from judgments of intermediate state courts, and claims that it would be too much work for federal habeas courts to

determine whether a hypothetical certiorari petition would have fallen within the jurisdictional grant of section 1257(a). Pet. Br. 54. Therefore, according to Gonzalez, courts should give *every* criminal defendant who declines to petition for a writ of certiorari an extra 90 days of direct-review time—including those, like Gonzalez, who were clearly ineligible to file a certiorari petition in this Court.

This proposal cannot be reconciled with the text of section 2244(d)(1)(A). The "time for seeking [direct] review" does not continue when a litigant is patently ineligible to "seek[]" a writ of certiorari from this Court or pursue direct appeals in any other court. And when a convicted federal prisoner fails to take a direct appeal to the court of appeals, his judgment becomes "final" under section 2255(f)(1) when the 10-day window for filing a notice of appeal closes; he does not get an extra 90 days if he throws in the towel after the adverse district-court ruling. See, *e.g.*, *United States* v. *Plascencia*, 537 F.3d 385, 388 & n.11 (5th Cir. 2008) (collecting Second, Third, and Sixth Circuit authorities); *Anjulo-Lopez* v. *United States*, 541 F.3d 814, 816 n.2 (8th Cir. 2008); *United States* v. *Prows*, 448 F.3d 1223, 1227-1228 (10th Cir. 2006). Gonzalez is correct to note that *Snook* v. *Wood*, 89 F.3d 605, 612 (9th Cir. 1996), asserts (without any analysis) that finality for *Teague* purposes occurs 90 days after an intermediate state court terminates direct review, even though the defendant in that case voluntarily withdrew his appeal and never sought further review in the state supreme court. We respectfully ask this Court to disapprove that part of the Ninth Circuit's opinion.

CONCLUSION

The judgment of the court of appeals should be vacated and the cause remanded with instructions to dismiss the appeal for lack of jurisdiction. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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