QUESTION PRESENTED

Whether a state post-conviction motion seeking a discretionary reduction of sentence is an "application for State post-conviction or other collateral review" tolling the limitation period under 28 U.S.C. §2244(d)(1) for the filing of a federal petition for a writ of habeas corpus?

STATEMENT

Khalil Kholi, an individual in the custody of the State of Rhode Island, filed a pro-se petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court for the District of Rhode Island on September 5, 2007 (*Kholi v. Wall*, 582 F.3d 147, 150 (1st Cir. 2009).[1] The State of Rhode Island filed a motion to dismiss the petition on September 21, 2007, alleging that the petition was time-barred (*id.*).

As described in the First Circuit opinion, the United States district court found the following: Mr. Kholi's December 1995 convictions for first-degree sexual assault on his two stepdaughters and sentence to two consecutive life terms of imprisonment were affirmed on February 29, 1996 (*State v. Kholi*, 672 A.2d 429 (R.I. 1996)) (582 F.3d at 149). Mr. Kholi filed a Motion to Reduce Sentence pursuant to Rule 35(a) of the Rhode Island Superior Court Rules of Criminal Procedure on May 16, 1996. That motion was denied; the denial was affirmed by the Rhode Island Supreme Court on January 16, 1998 (*State v. Kholi*, 706 A.2d 1326 (R.I. 1998)) (582 F.3d at 149-150). On May 23, 1997 Mr. Kholi filed an application for post conviction relief pursuant to R.I. Gen. L. §10-9.1-1 in the Rhode Island Superior Court. That application was denied in April 2003; the denial was affirmed by the Rhode Island Supreme Court on December 14, 2006 (*Kholi v. Wall*, 911 A.2d 262 (R.I. 2006)) (582 F.3d at 150). The federal pro-se petition for a writ of habeas corpus was filed approximately nine months after the end of

[1] The First Circuit opinion is appended to this opposition.

his efforts to obtain relief from his conviction and sentence in the state court (582 F.3d at 150).

In an Order entered on January 3, 2008 the United States District Court for the District of Rhode Island (Smith, U.S.D.J.) dismissed the petition with prejudice, finding that the motion to reduce sentence did not toll the limitations period of 28 U.S.C. §2254(d)(1). Judgment was entered on January 3, 2008 (582 F.3d 150). Kholi's request a certificate of appealability from the district court was denied on January 31, 2008 (*id.*).

On August 22, 2008 the United States Court of Appeals for the First Circuit granted a certificate of appealability and appointed counsel. After briefing and argument the court analyzed the language, structure and purpose of the federal statute (28 U.S.C. §2254(d)) and concluded that the motion to reduce sentence was a motion for "State post-conviction or other collateral review" within the meaning of 28 U.S.C. §2254(d)(2) which tolled the one year limitation period of 28 U.S.C. §2254(d)(1). It reversed the order of dismissal.

REASONS FOR DENYING THE WRIT

I. Review Should Await Further Development of the Issue in the Circuit Courts of Appeals

There is a conflict between the First and Tenth Circuits and the Third, Fourth and Eleventh Circuits as to whether a motion filed in state court for a discretionary reduction of sentence tolls the limitations period of 28 U.S.C. §2254(d)(1). The varied rationales underlying these opinions suggest that review of this issue should await further development by other circuits. Moreoever , it is not clear that the issue affects a significant number of the reportedly more than 1.4 million persons incarcerated in state prisons noted by petitioner (Pet.14).[2]

[2] "Pet." refers to the Petition for Writ of Certiorari filed by Petitioner, A.T. Wall.

The three circuits that have held that a motion for a discretionary reduction of sentence is not a tolling event have employed different rationales and seven circuits have not addressed the question. The Fourth Circuit deemed such a motion to be not collateral in nature, defining collateral review as "a proceeding separate and distinct from that in which the original judgment was rendered , and in which the petitioner challenges the legality of the original judgment." *Walkowiak v. Haines*, 272 F.3d 234, 237 (4th Cir. 2001). While agreeing that the review requested must be collateral to toll the limitations period, the Third Circuit focused on the motion's relationship to issues of comity, finality and federalism. *Hartmann v. Carroll*, 492 F.3d 478 (3rd Cir. 2007). The Eleventh Circuit discussed the interests of finality and exhaustion, the absence of allegations of legal error in the motion for reduction, noted the Fourth Circuit's holding that such a motion was not "collateral", and found the "analyses and conclusions" of the Third and Fourth Circuits "consistent" with its conclusion. *Alexander v. Secretary, Dept. Of Corrections*, 523 F.3d 1291, 1299 (11th Cir. 2008).

In holding that a motion for a discretionary reduction of sentence is a tolling event, the Tenth Circuit construed the language of 28 U.S.C. §2254(d)(2) as not requiring that a motion contain a constitutional challenge. It defined a state motion for reduction of sentence as related to the pertinent judgment or claim. It also noted comity concerns. *Robinson v. Golder*, 443 F.3d 718 (10th Cir. 2006). The First Circuit first addressed the text of the statute and concluded its plain meaning favored the conclusion that the filing of a Rhode Island motion to reduce sentence was a tolling event. It then examined and rejected the analyses of the Third, Fourth and Eleventh Circuits and analyzed not only the impact of doctrines of finality and exhaustion but also the principles of comity and federalism. *Kholi v. Wall*, 582 F.3d 147 (1st Cir. 2009).

Resolution of the issue presented might benefit from further development of the issues in the seven circuits that have not yet addressed the issue not only because of the varied rationales of the existing opinions, but also because of the variations in state reduction of sentence provisions that could be candidates for tolling events. Some state provisions addressing a motion for discretionary reduction of sentence have time frames for filing generally running only from the imposition or commencement of service of sentence. *See e.g.* De.R.Super.Ct. RCRP Rule 35; IC 35-38-1-17; Tenn. R.Crim.P., Rule 35. Others run from the imposition of sentence and/or resolution of appeals and/or petitions for certiorari. *See e.g.* W.Va.R. Crim.P., Rule 35; Fla.R.Crim.P. Rule 3.800(c); SDCL §23A-31-1. Some require resolution as well as filing, within certain time frames. *See e.g.* N.D.R.Crim.P., Rule 35; N.J. R.Crim.P., Rule 3:21-10.; Pa.R.Crim.P. Rule 720. Some limit the class of defendants eligible for relief. *See e.g.* C.G.S.A. §53a-39; 22 Okl.St.Ann. §982a. .

The petitioner also suggests that this case could serve as a vehicle for clarifying standards to apply in determining whether the myriad other types of state court pleadings are, or are not, "application[s] for State post-conviction or other collateral review." (Pet.16-17). This case analyzed one specific type of motion with defined characteristics. Other state pleadings will present different issues. A one size fits all approach is not appropriate.

II. The First Circuit Fully Considered and Properly Decided the Issue Presented

In addressing whether the motion for reduction of sentence pursuant to Rhode Island Superior Court Rule of Criminal Procedure 35(a) tolled the limitations period of 28 U.S.C. §2254(d)(1), the First Circuit began by examining the text of the relevant statutory provision – 28 U.S.C. §2254(d)(2) ("State post-conviction or other collateral review with respect to the

pertinent judgment or claim") – and concluded its plain language supported the conclusion that it tolled the limitations period. First, the "pertinent judgment" was the sentence. The motion "is obviously a motion that seeks state post-conviction review of that sentence. ... a sentence cannot be reduced without first being reexamined (*i.e.*, reviewed)." (*Kholi v. Wall*, 582 F.3d at 152). Second, Congress's choice of the word "review" rather than "challenge supported the conclusion that tolling was not limited to motions presenting a legal challenge to the judgment (*id.* at 153).

The First Circuit disagreed with the Fourth Circuit's analysis of the meaning of the words "post-conviction or other collateral review". Rather than limiting the scope of tolling to motions defined as collateral in the sense of being filed in a separate proceeding, the First Circuit concluded that that interpretation failed to give meaning to the word "or" and viewed the phrase "or other collateral review" as "*expand[ing]* the scope of the tolling provision to cover the entire gamut of state judicial procedures that are available for testing the pertinent conviction or sentence." (582 F.3d at 153)(emphasis in original). The court also noted that other state post-conviction motions deemed to toll the limitations period are heard by the trial judge (*id.* at 153-154). Finally, in terms of textual analysis, the court noted that the term "collateral" had other meanings equally applicable in the context of the statute (*id.* at 154 n.6).

Addressing the discerned purposes of the statute, as had the Third and Eleventh Circuits, the court came to different conclusions. The court examined the statutory purpose in light of this Court's indication in *Williams v. Taylor*, 529 U.S. 420, 436 (2000) "that Congress enacted the AEDPA 'to further the principles of comity, finality, and federalism.'" (582 F.3d at 154). It concluded that while finality was important, it was not an absolute interest, as indicated by the presence of the tolling provision and the requirement of 28 U.S.C. §2254(b)(1)(A) that a habeas

applicant exhaust available state court remedies before filing a federal application (*id.*). Nor was tolling for a state discretionary sentence reduction motion inconsistent with the exhaustion requirement, since the state motion"implicates no claim that is susceptible of exhaustion."(*id.* at 154-155). In the court's view the Third Circuit had failed to recognize that exhaustion and tolling are "separate and distinct" concepts (*id.* at 155). Finally, the court concluded that "principles of comity and federalism support tolling" (*id.*). In Rhode Island, the motion to reduce sentence is a proceeding separate from a direct appeal, which may be separately appealed. Without tolling, a defendant may be forced to file federally before the state court has concluded its review , and a federal court could be forced to review a state conviction while state proceedings are still ongoing. "That would be antithetic to the design that Congress had in mind." (*id.*). It could also lead to the filing of protective, and ultimately unnecessary or poorly framed, habeas petitions (*id.*). The state motion for reduction could, for example, eliminate sentencing claims that would otherwise be appropriate for federal habeas review.

Respondent submits that the analysis of the First Circuit thoroughly addressed all of the concerns raised in the decisions in the Third, Fourth, and Eleventh Circuits and came to the correct result.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.