No. 09-868



In The
# Supreme Court of the United States

A.T. WALL, Director,
Rhode Island Department of Corrections,

*Petitioner,*

v.

KHALIL KHOLI,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## REPLY BRIEF

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Respondent acknowledges the circuit split on the question of whether a sentence-reduction motion consisting of a plea for leniency tolls the one-year limitations period of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Br. in Opp. 2 ("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. § 2244(d)(1)."). [1] Respondent, moreover, also seems to recognize that the question presented is of practical importance to a state prisoner challenging her state-court judgment of conviction in a United States District Court pursuant to 28 U.S.C. § 2254. Br. in Opp. 3-4 (suggesting that resolution of the presented tolling question, within the seven circuits that have not yet addressed the issue, might be implicated by the particular state sentence-reduction provision under consideration). Respondent, however, argues that because the "[r]esolution of the issue presented might benefit from further development of the issues in the seven circuits that have not yet addressed the issue," certiorari is inappropriate. Br. in Opp. 3-4. Moreover, Respondent contends, because the rationales advanced by the five circuits that have considered, and

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[1] Indeed, the First Circuit itself began its analysis of the question presented by recognizing the "chiaroscuro backdrop" of the extant "circuit split[.]" *Kholi v. Wall*, 582 F.3d 147, 152 (1st Cir. 2009).

split on, the question presented have been "varied" (*id.* at 2), "review of this issue should await further development by other circuits." Br. in Opp. 2. Neither of these arguments is persuasive.[2]

*First*, it is difficult to conceive how "the development of the issues in the seven circuits that have not yet addressed the issue" (Br. in Opp. 3) could resolve the three-to-two circuit split. Even were Respondent not wrong that "the First Circuit . . . came to the correct result" (*id.* at 6) on the question,[3] it seems rather improbable that the remaining circuits "yet [to have] addressed the issue" (*id.*) will, in due course, fall in line with the First Circuit's

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[2] There is also, in the Brief in Opposition, at least the suggestion that a three-to-two circuit split is too shallow to warrant review. Br. in Opp. 2 (noting that since the 1996 enactment of the AEDPA "only five circuits have confronted this issue"). As the Court this very Term, however, granted certiorari in an AEDPA, indeed a § 2244, case involving a circuit split no deeper than two to one (*see* Petition for Writ of Certiorari in *Magwood v. Patterson*, 09-158 (filed Aug. 4, 2009), at pp. 14-15 (asserting the existence of a two to one circuit split on the construction of the phrase "second or successive" of § 2244(b) of the AEDPA)), there should hardly be a colorable suggestion that a three-to-two circuit split, on the significant question as to whether a class of state court submissions qualify to toll the AEDPA's one-year limitations period, is too narrow to warrant review.

[3] As the State of Rhode Island explained in the petition for writ of certiorari, the below determination of the First Circuit Court of Appeals is erroneous, if for no other reason than that its reading of § 2244(d)(2) is difficult to square with certain pronouncements of this Court as to the meaning of that provision. *See* Pet. 18-22.

determination, against that of the Third, Fourth and Eleventh Circuits.[4] If those circuits do not reach unanimity on the question presented, the circuit split will only deepen, perpetuating and substantially exacerbating the existing circumstance whereby state prisoners in different circuits operate under a

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[4] Indeed, the First Circuit's reading of the phrase "State post-conviction . . . review" to embrace also *direct* review of the pertinent state court judgment or claim (*Kholi v. Wall*, 582 F.3d at 152-53) appears incongruent with panel opinions in at least two of the seven circuits which have not yet decided the question. *See Malcom v. Payne*, 281 F.3d 951, 958 (9th Cir. 2002) (stating that "we know that the statute – by referring to '*other* collateral review' (emphasis added) – uses the term 'State post-conviction . . . review' as simply one type of 'collateral review.' "); *Polson v. Bowersox*, 595 F.3d 873, 875 (8th Cir. 2010) ("Our Court has held that other forms of *collateral* review under Missouri's appellate procedure qualify for statutory tolling under § 2244(d)(2).") (emphasis added). And, very recently, an Eastern District of Louisiana United States Magistrate Judge, refusing to characterize as a § 2244(d)(2) tolling mechanism a state court submission complaining of access to a Louisiana Risk Review Panel leniency review, read the Fifth Circuit's decision in *Moore v. Cain*, 298 F.3d 361, 367 (5th Cir. 2002) (holding that an application for writ of mandamus did not qualify as a § 2244(d)(2) "application for State post-conviction or other collateral review") to support such determination. *Horne v. Caine*, No. Civ. A. 09-5509 (Feb. 24, 2010), 2010 WL 1332977 (E.D.La.), at *5. (The Magistrate Judge also cited with approval the Eleventh, Third, and Fourth Circuits' decisions in, respectively, *Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297 (11th Cir. 2008), *Hartmann v. Carroll*, 492 F.3d 478, 483-84 (3d Cir. 2007), and *Walkowiak v. Haines*, 272 F.3d 234, 239 (4th Cir. 2001), as against the First Circuit's *Kholi* decision. *Horne v. Caine*, No. Civ. A. 09-5509 (Feb. 24, 2010), 2010 WL 1332977 (E.D.La.), at *5.)

conflicting habeas corpus tolling calculus. And even if the remaining circuits "yet [to have] addressed the issue" (Br. in Opp. 3) *were* to construe the phrase "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), as did the First Circuit, a rather implausible eventuality (*see* footnote 4, *supra*), the very same question presented will continue to persist – only in the form of an even deeper and more entrenched circuit split. Awaiting "the development of the issues in the seven circuits that have not yet addressed the issue" (Br. in Opp. 3), then, could only serve to deepen the existing circuit split, and greatly perpetuate the circumstance whereby the availability of federal habeas corpus relief might depend solely upon the locale of a prisoner's state court judgment.

*Second*, even accepting Respondent's contention that the five circuits to have addressed the question presented have articulated "varied rationales" in support of their respective determinations (Br. in Opp. 3-4), that is hardly good reason to allow the geographical happenstance of a prisoner's state court judgment to determine the availability of federal habeas corpus review. In any event, Respondent's suggestion that there are numerous rationales underlying the opinions of the five circuits (Br. in Opp. 2), is inaccurate. There are, in fact, only two underlying rationales upon which the circuits are split: (1) The proper statutory interpretation of the phrase "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2); and (2) the

relevant policy considerations that should bear upon the question whether a state court sentence-reduction motion consisting of a plea for leniency qualifies as such an application.[5] With respect to the first issue, the First and Fourth Circuits disagree as to the proper textual interpretation of the phrase "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2). *See Kholi v. Wall*, 582 at 153-54 (analyzing and rejecting the "textual" reading and interpretation that the Fourth Circuit in *Walkowiak v. Haines*, 272 F.3d at 237-39, gave to § 2244(d)(2)). And as to the second, policy-based, issue of disagreement, the First Circuit was critical of the Eleventh and Third Circuits' singular focus, in, respectively, *Alexander v. Sec'y, Dep't of Corr.*, 523 F.3d 1291, 1297 (11th Cir. 2008), and *Hartmann v. Carroll*, 492 F.3d 478, 483-84 (3d Cir. 2007), upon "the AEDPA's discerned purposes [of] . . . encouraging the exhaustion of state remedies and safe-guarding the finality of state-court judgments" (*Kholi v. Wall*, 582 F.3d at 154), to the apparent exclusion of the AEDPA's competing "principles of comity and federalism" (*id.* at 154-55). The First Circuit thus emphasized the very same comity concerns which had animated the Tenth Circuit's holding, in *Robinson v. Golder*, 443 F.3d 718, 720-21 (10th Cir. 2006), that a

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[5] *See Kholi v. Wall*, 582 F.3d at 153 ("We are mindful that three of our sister circuits have concluded that pleas for leniency do not trigger the AEDPA's tolling provision. These courts have relied on *two* different lines of reasoning to reach that result.") (emphasis added).

sentence-reduction motion made pursuant to Colorado Rule of Criminal Procedure 35(b) qualifies as an "application for State post-conviction or other collateral review" under § 2244(d)(2). Plainly, then, the three-to-two circuit split on the question presented is grounded upon a disagreement with respect to the discrete issues of statutory interpretation and AEDPA policy, not upon any more numerous and varying rationales, or any "variations in state reduction of sentence provisions" (Br. in Opp. 4).[6]

To promote uniformity in the AEDPA's one-year statute of limitations tolling calculus, and to bring to an end the existing geographical disparity with respect to such calculation, this Court's resolution of the circuit conflict on the narrow question presented is warranted at this time.

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[6] Indeed, Rule 35 of the Delaware Rules of Criminal Procedure, providing in most relevant part that "[t]he court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed", and Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure, providing in most relevant part that "[t]he court may . . . reduce any sentence when a motion is filed within one hundred and twenty (120) days after the sentence is imposed", are so analogous, that it is evidently untenable to suggest (Br. in Opp. 4) that the contradictory holdings of *Kholi v. Wall*, 582 F.3d at 152-53, considering R.I.R. Crim. P. 35, and *Hartmann v. Carroll*, 492 F.3d at 483-84, considering Delaware's comparable provision, might merely be attributable to "the variation[ ] in state reduction of sentence provisions" (Br. in Opp. 4).

For the foregoing reasons, and those stated in the petition for writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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