No. 01-1500

In the Supreme Court of the United States

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Court granted certiorari limited to the following question:

Whether petitioner's judgment of conviction became "final" within the meaning of 28 U.S.C. 2255 para. 6(1) when the court of appeals issued its mandate on direct appeal or when his time for filing a petition for a writ of certiorari expired.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished but is available at 30 Fed. Appx. 607.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2002. The petition for a writ of certiorari was filed on April 5, 2002, and was granted on June 28, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Paragraph 6 of 28 U.S.C. 2255, which establishes the statute of limitations for motions for collateral relief filed by federal prisoners, provides:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. 2255 para. 6.

2. Section 2244(d)(1) of Title 28 of the United States Code, which provides the general statute of limitations for federal habeas petitions filed by state prisoners, 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.

28 U.S.C. 2244(d)(1).

3. Section 2263 of Title 28 of the United States Code, which provides the statute of limitations for habeas petitions filed by prisoners subject to capital sentences in States that qualify for expedited collateral review procedures, provides:

> (a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> (b) The time requirements established by subsection (a) shall be tolled—
>
> (1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme

> Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;
>
> (2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and
>
> (3) during an additional period not to exceed 30 days, if—
>
> (A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and
>
> (B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

28 U.S.C. 2263.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of arson, in violation of 18 U.S.C. 844(i), and distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. He was sentenced to 137 months of imprisonment, to be followed by three years of supervised release. *Ibid.*; *United States* v. *Clay*, 165 F.3d 33 (Table), No. 98-1783, 1998 WL 847098, at *2 (7th Cir. Nov. 23, 1998). The court of appeals affirmed his convictions. Pet. App. 2a. The district court denied petitioner's motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, but issued him a certifi-

cate of appealability. Pet. App. 2a-3a. The court of appeals affirmed the denial of the Section 2255 motion. *Id.* at 1a-6a.

1. During the summer of 1996, petitioner began selling crack cocaine to Tammy Sue Herring, who lived in a rented room in a house in South Bend, Indiana. Pet. App. 2a. In an apparent effort to force Herring to pay her drug debt to him, petitioner set the residence on fire and thereby caused severe damage. *Ibid.*

A federal grand jury in the Northern District of Indiana returned a two-count indictment that charged petitioner with arson, in violation of 18 U.S.C. 844(i), and distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. On December 30, 1997, a petit jury found petitioner guilty of both charges, and the district court sentenced him to 137 months of imprisonment, to be followed by three years of supervised release. *Ibid.*; 1998 WL 847098, at *2.

2. On November 23, 1998, the United States Court of Appeals for the Seventh Circuit affirmed petitioner's convictions in an unpublished order. Pet. App. 2a. On December 15, 1998, the court of appeals issued its mandate. *Ibid.* Petitioner did not file a petition for a writ of certiorari. *Ibid.*

3. On February 22, 2000, petitioner, acting *pro se*, filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Petitioner argued that the indictment under which he was convicted failed to allege that he possessed the mental state necessary to be guilty of arson and that his trial counsel rendered constitutionally ineffective assistance in various respects. Motion under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody 5-6, 8. The government filed a response to the Section 2255 motion in which it argued that petitioner's

claims were "completely meritless." Gov't Response to Petitioner's 2255 Motion to Vacate, Set Aside, or Correct Sentence 1. On May 4, 2000, petitioner filed a motion for leave to amend his Section 2255 motion. Motion for Leave to Amend 1. Petitioner proposed to amend his Section 2255 motion to add two new claims —that his sentence violated the Ex Post Facto Clause of the Fifth Amendment and that another of his trial counsel's actions constituted ineffective assistance. Amended Motion to Vacate Judgment or Sentence 1-2, 7-8.

On June 21, 2000, the district court filed a memorandum and order in which the court observed that 28 U.S.C. 2255 contains a limitation provision requiring, in pertinent part, that a federal prisoner file any motion for relief under Section 2255 within one year after his judgment of conviction becomes final. 6/21/00 Order 2. The court noted that "[petitioner's Section 2255] petition would seem to be time-barred" because he filed it more than one year after the court of appeals issued the mandate in his direct appeal, and because petitioner did not seek a writ of certiorari from this Court. *Id.* at 3. The court directed the parties "to show cause why [petitioner's Section 2255] petition should not be dismissed as untimely." *Id.* at 4.

The government filed a response to the court's memorandum and order in which the government acknowledged that petitioner's Section 2255 motion was untimely under Seventh Circuit law. Gov't Response to the Dist. Ct. Mem. and Order of June 21, 2000, at 1. The government explained, however, that the United States disagrees with the Seventh Circuit's interpretation of Section 2255's limitation provision and instead takes the position that "a conviction does not become 'final' under [Section] 2255 until expiration of the time allowed for

certiorari review by the Supreme Court." *Id.* at 2 (quoting *Kapral* v. *United States*, 166 F.3d 565, 566 (3d Cir. 1999)). The government noted that "[p]etitioner's Section] 2255 [p]etition would be timely" under that construction of Section 2255. *Ibid.*

The district court denied petitioner's Section 2255 motion and motion to amend. Pet. App. 7a-9a. Relying on *Gendron* v. *United States*, 154 F.3d 672, 674 (7th Cir. 1998) (per curiam), cert. denied, 526 U.S. 1113 (1999), the court stated that, "when a federal prisoner in this circuit does not seek certiorari * * *, the conviction becomes 'final' on the date the appellate court issues the mandate in the direct appeal." Pet. App. 8a. Because petitioner did not file his Section 2255 motion until more than one year after that date, the court denied the motion as time-barred and rejected petitioner's subsequent motion to amend. *Id.* at 8a-9a. The court declined to excuse the late filing under the doctrine of equitable tolling (which petitioner had not raised) and denied petitioner's alternative request for relief under Rule 60(b) of the Federal Rules of Civil Procedure. *Ibid.* The court issued a certificate of appealability limited to the question "whether [petitioner's] Sixth Amendment right to effective assistance of counsel was violated." 9/13/00 Order 2.

4. On January 25, 2002, the court of appeals issued an unpublished order in which it affirmed the judgment of the district court dismissing petitioner's Section 2255 motion. Pet. App. 1a-6a. The court noted that it had stricken petitioner's first appellate brief because that brief had failed to address the Sixth Amendment claims for which the district court had issued the certificate of appealability. *Id.* at 3a. The court further noted that, although it had ordered petitioner to address those claims, his second brief addressed only the question

whether the district court properly dismissed his Section 2255 motion as untimely. *Ibid.* The court concluded, however, that it did not need to address the merits of petitioner's Sixth Amendment claims because it agreed with the district court's determination that petitioner's Section 2255 motion was untimely. *Ibid.*

The court of appeals noted that it had previously held in *Gendron*, *supra*, that "federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal." Pet. App. 5a (quoting *Gendron*, 154 F.3d at 674). The court declined petitioner's "invitation to reconsider [its] holding in *Gendron*," although the court acknowledged that its "construction of section 2255 represents the minority view." *Ibid.* After stating that petitioner had filed his Section 2255 motion "sixty-nine days too late," the court "f[ou]nd that the district court was correct when it denied the motion." *Id.* at 6a.

SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, requires a federal prisoner seeking collateral relief under 28 U.S.C. 2255 to file the motion within one year of the latest of several dates, including, as relevant here, "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255 para. 6(1). The word "final" is not defined in Section 2255, but "final" has a well-settled background meaning in the law of collateral review. As this Court has made clear in delineating when decisions announcing new rules of criminal procedure are applicable to a particular case, a criminal case becomes "final" for purposes of collateral review when "a judgment of conviction has been rendered, the

availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987); see *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994) (applying that definition for purposes of retroactivity analysis under *Teague* v. *Lane*, 489 U.S. 288 (1989)). That meaning of "final"—one that deems a case to be final when the time for filing a certiorari petition elapses (if no petition is filed)—is the logical definition to apply to the AEDPA's statute of limitations as well.

A. The court of appeals' position—that a case becomes final (for a federal prisoner who does not seek certiorari) when the appellate mandate issues—departs from the background definition in this Court's collateral review cases and is unsupported by the structure of the AEDPA. "Final" appears not just in Section 2255 para. 6(1) but also in 28 U.S.C. 2244(d)(1)(A), the parallel limitation provision applicable to state prisoners seeking collateral relief under 28 U.S.C. 2254. Section 2244(d)(1)(A), which was enacted simultaneously with Section 2255 para. 6 as part of the AEDPA, identifies the date that a judgment becomes "final" as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The courts of appeals have uniformly interpreted "direct review" in Section 2244(d)(1)(A) to encompass review of the conviction by this Court. Thus, when a state prisoner does not petition this Court for certiorari following the affirmance of his conviction in the highest state court, the judgment becomes final when his time for seeking certiorari in this Court expires. Given the similar purpose, language, and structure of the two limitation provisions, the background definition of "final" in this Court's cases, and the presumption that words have the

same meaning throughout a statute, the definition of "final" in Section 2244(d)(1)(A) is equally applicable to Section 2255.

B. Interpreting Section 2255 para. 6(1) to mean that a judgment becomes "final" when the time expires for seeking certiorari furthers the orderly administration of direct and collateral review proceedings and accords with the AEDPA's purpose. That interpretation ensures that all direct review has concluded before a defendant shifts his focus to post-conviction relief. It is therefore consistent with the longstanding rule that collateral review is inappropriate while a case is still pending on direct review. The interpretation also ensures that the law that will govern a Section 2255 motion is settled before the limitation period for the filing of the motion commences. And it sensibly gives similarly-situated state and federal prisoners the same amount of time in which to commence collateral review proceedings.

The conclusion that a judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) when the time expires to seek review in this Court also accords with the AEDPA's purpose of limiting the time in which a prisoner may initiate post-conviction proceedings. Because the mandate normally issues 21 days after the court of appeals enters judgment, the difference between that interpretation and a construction under which a conviction becomes final when the court of appeals issues its mandate is, in most cases, only 69 days. That relatively brief period is unlikely to slow the collateral review process in any meaningful way. In fact, the alternative approach could result in more substantial delay by creating a strong incentive for prisoners to file petitions for certiorari merely to extend the time for commencing collateral attack.

C. The Fourth and Seventh Circuits—relying on the maxim *expressio unius est exclusio alterius*—compared the language of Sections 2244 and 2255 and concluded, by negative implication, that the term "final" in Section 2255 does not include the time in which a prisoner may (but does not) seek further direct review. That negative inference is flawed, however. If one were to draw a negative inference from the difference between Sections 2244 and 2255, the logical conclusion would not be the one reached by the Fourth and Seventh Circuits —that finality in Section 2255 includes one portion, but not all, of Section 2244's definition of final. Rather, the logical conclusion would be that Section 2255's definition of finality includes neither portion of Section 2244's definition. That is, finality under Section 2255 would entail neither "the conclusion of direct review" nor "the expiration of the time for seeking such review." Under that interpretation of Section 2255, a federal prisoner's judgment of conviction would become "final" immediately upon the district court's entry of the judgment. No court has adopted that construction of Section 2255, which would require many federal prisoners to commence their collateral attacks while their direct appeals were still pending. This Court has counseled against reliance on the *expressio unius* maxim where, as here, it would produce such illogical results. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Echazabal*, 122 S. Ct. 2045, 2051 (2002). The more sensible and more natural inference is that the definition of "final" in Section 2244 also applies under Section 2255, as both involve the collateral review setting in which this Court has already defined the term final.

The difference in language between Section 2255 and 28 U.S.C. 2263 also fails to support the approach adopted by the Fourth and Seventh Circuits. Section

2263 requires state capital defendants in States qualifying for expedited collateral review procedures to file their habeas petitions within 180 days "after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." Section 2255 para. 6(1) refers to *neither* of the two events that Section 2263 identifies as possible starting points for the limitation period—"affirmance of the conviction and sentence on direct review" and "the expiration of the time for seeking such review." Thus, reasoning by negative implication from Section 2263 does not justify the conclusion that the limitation period in Section 2255 para. 6(1) begins to run at one of those times rather than the other. Moreover, the limitation period in Section 2263 runs not from when the conviction "becomes final," but from "State court affirmance." Accordingly, there is no reason to infer that Congress rejected in Section 2255 an approach that it incorporated into Section 2263, and the distinctions between those sections do not support the reading of Section 2255 adopted by the Fourth and Seventh Circuits.

D. When one applies the correct definition of "final," it is clear that petitioner's Section 2255 motion was timely filed. Because petitioner did not file a petition for a writ of certiorari to review his direct appeal, his judgment of conviction became final when the time within which he could have filed a petition expired. That occurred on February 22, 1999, 90 days after the court of appeals affirmed his convictions. Petitioner filed his Section 2255 motion on February 22, 2000, exactly one year later. The court of appeals thus erred in holding that petitioner's motion was untimely.

ARGUMENT

WHEN A DEFENDANT DOES NOT PETITION THIS COURT FOR A WRIT OF CERTIORARI ON DIRECT APPEAL, HIS CONVICTION BECOMES "FINAL" FOR PURPOSES OF 28 U.S.C. 2255 WHEN THE TIME FOR SEEKING CERTIORARI EXPIRES

Before the enactment in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, 110 Stat. 1214, there was no statute of limitations on the filing of federal motions for collateral relief. See *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986) (noting the absence of a statute of limitations in a case involving a habeas petition by a state prisoner under 28 U.S.C. 2254); *United States* v. *Nahodil*, 36 F.3d 323, 327-328 (3d Cir. 1994) (applying *Vasquez* to a motion for collateral relief by a federal prisoner under 28 U.S.C. 2255); 28 U.S.C. 2255 (1994) (stating that "[a] motion for such relief may be made at any time"). The only timeliness constraint was the court's authority to dismiss the motion if the government had "been prejudiced in its ability to respond to the motion by delay in its filing." 28 U.S.C. 2255 Rule 9(a). As a result, a prisoner could "wait a decade" or more after his conviction before seeking collateral relief. *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997).

Concerned that existing rules did not sufficiently protect the finality of criminal judgments, Congress imposed statutes of limitations when it enacted the AEDPA. Section 105 of the AEDPA, 110 Stat. 1220, establishes a "1-year period of limitation" for Section 2255 motions by federal prisoners. See 28 U.S.C. 2255 para. 6. The one-year period runs from "the latest of" four specified events. The relevant triggering event for

this case is "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255 para. 6(1).[1] The AEDPA does not, however, define when a judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1).[2]

The courts of appeals have uniformly concluded that, when a federal prisoner pursues all available avenues for direct review, including filing a petition for a writ of certiorari in this Court, the judgment of conviction becomes final only when this Court denies the writ or affirms the conviction and sentence on the merits.[3] The

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[1] Section 2255 para. 6(1) provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final * * *.

28 U.S.C. 2255 para. 6.

[2] The AEDPA also does not define the term "judgment of conviction." In general, a federal prisoner's "judgment of conviction" includes both the adjudication of guilt and the sentence. See Fed. R. Crim. P. 32(d)(1); *Deal* v. *United States*, 508 U.S. 129, 132 (1993). The courts of appeals have applied that general definition to the term as used in Section 2255. See, *e.g.*, *Kapral* v. *United States*, 166 F.3d 565, 569 (3d Cir. 1999).

[3] See *United States* v. *Hicks*, 283 F.3d 380, 387 (D.C. Cir. 2002); *Rogers* v. *United States*, 180 F.3d 349, 352 (1st Cir. 1999), cert. denied, 528 U.S. 1126 (2000); *Green* v. *United States*, 260 F.3d 78, 84 (2d Cir. 2001); *Kapral* v. *United States*, 166 F.3d 565, 577 (3d Cir. 1999); *United States* v. *Segers*, 271 F.3d 181, 186 (4th Cir. 2001), cert. denied, 122 S. Ct. 1331 (2002); *United States* v. *Thomas*, 203 F.3d 350, 355 (5th Cir. 2000); *Johnson* v. *United States*, 246 F.3d 655, 657 (6th Cir. 2001) ("[a]s a general rule"); *Horton* v. *United States*, 244 F.3d 546, 550-551 (7th Cir. 2001); *United States* v. *Colvin*, 204 F.3d 1221, 1223 n.2 (9th Cir. 2000) (dictum); *United States* v. *Simmonds*, 111 F.3d 737, 744 (10th Cir. 1997); *Washing-*

courts of appeals have divided, however, over the question presented in this case—when a judgment of conviction becomes "final" under 28 U.S.C. 2255 para. 6(1) in cases in which the defendant files an unsuccessful appeal but does not petition for a writ of certiorari. Six circuits have held that a conviction becomes final when the time for filing a petition for a writ of certiorari expires. See *Derman* v. *United States*, 298 F.3d 34, 39-42 (1st Cir. 2002), petition for cert. pending, No. 02-5907 (filed May 28, 2002); *Kaufmann* v. *United States*, 282 F.3d 1336, 1337-1339 (11th Cir. 2002); *United States* v. *Garcia*, 210 F.3d 1058, 1059, 1061 (9th Cir. 2000); *United States* v. *Gamble*, 208 F.3d 536, 537 (5th Cir. 2000); *United States* v. *Burch*, 202 F.3d 1274, 1276-1279 (10th Cir. 2000); *Kapral* v. *United States*, 166 F.3d 565, 570-577 (3d Cir. 1999). The Fourth and Seventh Circuits, however, have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review. See *United States* v. *Torres*, 211 F.3d 836, 839-842 (4th Cir. 2000); *Gendron* v. *United States*, 154 F.3d 672, 673-675 (7th Cir. 1998) (per curiam), cert. denied, 526 U.S. 1113 (1999).

The conclusion of the majority of the circuits is correct. Consistent with the text of the AEDPA and the definition of finality long-approved by this Court in the context of post-conviction review, a federal judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) only when the possibility of further direct review is exhausted. Thus, when a defendant does not file a petition for certiorari, the judgment of conviction

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ton v. *United States*, 243 F.3d 1299, 1300 (11th Cir. 2001). The Eighth Circuit has not addressed the issue.

becomes final when the time for filing a petition expires.

A. The AEDPA's Text And Structure And This Court's Precedents Indicate That The Conviction Of A Defendant Who Has Not Petitioned For Certiorari Becomes "Final" When The Time To Petition Expires

1. As noted above, Section 2255 does not define the term "final." But "final" has a well-settled meaning in the law of collateral review, and that meaning informs the interpretation of when a judgment of conviction becomes "final" within the meaning of Section 2255, which governs motions for collateral review by federal prisoners. Under the retroactivity analysis of *Teague* v. *Lane*, 489 U.S. 288 (1989), judicial decisions announcing new rules of criminal procedure do not apply to cases in which the conviction becomes "final" before the new rules are announced. *Id.* at 310 (plurality opinion). This Court's precedents applying the *Teague* analysis establish that, in that context, a judgment not reviewed by this Court becomes "final" when "the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994). The same definition of finality was also long used by the Court in its collateral review cases before *Teague*. See, *e.g.*, *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."); *United States* v. *Johnson*, 457 U.S. 537, 542 n.8 (1982) (same).

Although retroactivity principles have changed over time, the definition of when a case becomes final on direct review has been consistent over a series of this

Court's cases dating back more than 30 years before the enactment of the AEDPA. The finality definition in *Griffith* was used in *Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965), and *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 409 n.3 (1966). According to the Court in *United States* v. *Johnson*, *Linkletter* and *Shott* indicated that "all newly declared constitutional rules of criminal procedure would apply retrospectively at least to judgments of conviction not yet final when the rule was established." 457 U.S. at 543. In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the Court departed from that rule and applied a balancing test regardless of finality. Later, *United States* v. *Johnson*, 457 U.S. at 562, reestablished the general principle that new rules apply to cases not yet final on direct review. But the definition of finality remained constant throughout that course of development.

The meaning that this Court has given the term "final" for purposes of determining whether new rules of criminal procedure apply retroactively on collateral review is highly relevant to the meaning of "final" in Section 2255 para. 6(1). The Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *United States* v. *Wells*, 519 U.S. 482, 495 (1997) (citing *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995)). There is no indication in the AEDPA that Congress intended "final" to have a different meaning in Section 2255 para. 6(1) than the meaning this Court has accorded the term. On the contrary, because Section 2255, like the Court's cases defining finality, applies in the context of collateral review of criminal convictions, there is a particularly strong reason to presume that Congress intended "final" to have the same meaning in Section 2255 para.

6(1) as in those decisions. See *Porter* v. *Nussle*, 122 S. Ct. 983, 990 (2002) (construing the phrase "prison conditions" in a statute establishing exhaustion requirements for prison litigation to have the meaning this Court accorded the phrase in a similar context).

2. The conclusion that Congress intended in Section 2255 to adopt, and not silently to reject, this Court's definition of "final" in the collateral review context is confirmed by consideration of how "final" is used elsewhere in the AEDPA. Congress did define "final" in the AEDPA's parallel time-limit provision for state prisoners seeking collateral relief under 28 U.S.C. 2254. See 28 U.S.C. 2244(d)(1)(A).[4] The latter provision—which was enacted simultaneously with Section 2255 para. 6—fixes the date of "final" judgment as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Ibid.*

The courts of appeals have uniformly interpreted "direct review" in Section 2244(d)(1)(A) to encompass review of a state conviction by this Court.[5] Under that

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[4] 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 * * *.

28 U.S.C. 2244(d)(1).

[5] See *Williams* v. *Artuz*, 237 F.3d 147, 151 (2d Cir.), cert. denied, 122 S. Ct. 279 (2001); *Kapral*, 166 F.3d at 575; *Hill* v. *Braxton*, 277 F.3d 701, 704 (4th Cir. 2002); *Ott* v. *Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), cert. denied, 529 U.S. 1099 (2000); *Bronaugh* v. *Ohio*, 235 F.3d 280, 283 (6th Cir. 2000); *Anderson* v.

interpretation, when a state prisoner does not petition this Court for certiorari following the affirmance of his conviction in the highest state court, the judgment becomes final when his time for seeking certiorari from this Court expires. That construction of Section 2244(d)(1)(A) is consistent with this Court's statement in a related context that "the process of direct review [of a state conviction], if a federal question is involved, includes the right to petition this Court for a writ of certiorari." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983); see *Bell* v. *Maryland*, 378 U.S. 226, 232 (1964) ("In the present case the [state court] judgment is not yet final, for it is on direct review in this Court.").

The definition of "final" set forth in Section 2244(d)(1)(A) informs the meaning of "final" in Section 2255 para. 6(1). The "normal rule of statutory construction" followed by this Court assumes that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)); accord *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). Thus, the definition of a term supplied in one part of a statute generally applies to the term when it appears in other parts of the statute. *Gustafson*, 513 U.S. at 570; *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002); *Smith* v. *Bowersox*, 159 F.3d 345, 347-348 (8th Cir. 1998), cert. denied, 525 U.S. 1187 (1999); *Bowen* v. *Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999); *Locke* v. *Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001); *Coates* v. *Byrd*, 211 F.3d 1225, 1226 (11th Cir. 2000), cert. denied, 531 U.S. 1166 (2001); see *Derman*, 298 F.3d at 40-41 (concluding without discussion that Section 2244(d)(1)(A) includes time for seeking certiorari in this Court). The D.C. Circuit has not yet addressed the issue.

That principle has particular force here because Section 2255 para. 6(1) and Section 2244(d)(1)(A) were enacted at the same time, are nearly identical in structure, and have a common purpose. Section 2255 para. 6(1) prescribes a limitation period for motions for collateral relief from federal convictions, while Section 2244 prescribes a limitation period for petitions for collateral relief from state convictions. Congress enacted both provisions as part of the AEDPA in an effort to impose more definite time limits on the filing of petitions for post-conviction relief. See *Kapral*, 166 F.3d at 571 & n.4; H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996). Under those circumstances, it is reasonable to conclude that Congress intended the definition of "final" set forth in Section 2244(d)(1)(A) also to apply to Section 2255 para. 6(1). See *Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972) (rule of *in pari materia* "makes the most sense when the statutes were enacted by the same legislative body at the same time"); *Flanagan* v. *Johnson*, 154 F.3d 196, 200 n.2 (5th Cir. 1998) (the limitations provisions of Sections 2244 and 2255 should be construed *in pari materia* because of their identical purpose and similar language and structure).

3. In light of this Court's consistent articulation of a meaning for the word "final" in the collateral review setting and the presumption that Congress incorporated that definition in enacting the AEDPA, see pp. 16-18, *supra*, there is no reason to assume that dictionary definitions of "final" are helpful in interpretation of Section 2255. Nevertheless, the dictionary definition that fits most coherently with the language of Section 2255 recognizes finality only when the possibility of review by this Court elapses.

In some contexts, a judgment is deemed final when it resolves the entire controversy, even though the judgment still may be set aside on appeal. See *Webster's Third New International Dictionary* 851 (1993) (*Webster's*); *Black's Law Dictionary* 629 (6th ed. 1990) (*Black's*). Under that definition, a judgment of conviction is final when it is entered by the district court. See *Burch*, 202 F.3d at 1275. But that definition cannot apply under Section 2255, for it would require collateral review to begin before direct appeal is concluded.

In other contexts, a judgment may be deemed "final" if it is the last in time. See *Webster's* 851 (defining "final" as "last, terminating"); *Black's* 629 (defining "final" as "[l]ast"). But Congress's use of the phrase "becomes final" in Section 2255 would be untenably awkward for that definition of final. A court of appeals' judgment does not "become" the last in time; it simply is the last judgment, when no further review is sought.

The remaining definition is that a case becomes "final" when it is conclusive and not subject to further review. See *Webster's* 851 (defining "final" as "being a court finding that is conclusive as to jurisdiction and precluding the right to appeal to or continue the case in any other court upon the merits"); *Black's* 629 (defining "final decision or judgment" as "a decision from which no appeal or writ of error can be taken" and defining "final" as "conclusive; decisive; definitive; terminated; completed"). Under that definition, a judgment of conviction is final when there is no possibility of further direct review. There is nothing unnatural about applying that definition to Section 2255; and, because the alternative definitions do not fit, it supplies the best

contextual meaning for the word "final" as used in Section 2255.[6]

B. Defining "Final" As Not Subject To Further Direct Review Promotes Judicial Efficiency And Accords With The Purposes Of Section 2255

1. The view that a judgment of conviction does not become "final" until the time expires for seeking certiorari promotes the orderly administration of criminal justice. It is a well-established, longstanding rule that a district court may not ordinarily consider a Section 2255 motion while direct review is still pending. See *Kapral*, 166 F.3d at 572 (collecting authorities); 28 U.S.C. 2255 Rule 5 advisory committee's note (citing *Womack* v. *United States*, 395 F.2d 630, 631 (D.C. Cir. 1968)).[7] That

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[6] To the extent that the legislative history of Section 2255 para. 6(1) sheds any light on the meaning of "final," it too supports the interpretation that a judgment of conviction does not become final until the time for seeking certiorari has expired. In the decade preceding enactment of the AEDPA, Congress considered several bills that would have added to Section 2255 limitation provisions very similar to the provision ultimately enacted. The bill that passed the House in 1995 proposed a two-year limitation period that began to run at "[t]he time at which the judgment of conviction becomes final." H.R. 729, 104th Cong., 1st Sess. § 105, at 8 (1995) (as passed by the House and received in the Senate). Although the text of the bill did not define the term "final," the Committee Report on the bill indicated that a judgment becomes final on "the conclusion of direct review of [*sic*] expiration of the time for seeking direct review." H.R. Rep. No. 23, 104th Cong., 1st Sess. 16 (1995). See S. 1763, 98th Cong., 1st Sess. § 6, at 7 (1983) (as reported by Senate Committee on the Judiciary) (using same language as H.R. 729); S. Rep. No. 226, 98th Cong., 1st Sess. 30 (1983) (Judiciary Committee Report on S. 1763) (indicating that judgment "becomes final" at "the time remedies on direct review are exhausted or the time for seeking direct review has expired").

[7] See also, *e.g.*, *United States* v. *Cook*, 997 F.2d 1312, 1319 (10th Cir. 1993); *United States* v. *Gordon*, 634 F.2d 638, 638 (1st Cir.

rule reflects the common sense judgment that it does not "further judicial efficiency or economy to encourage a collateral attack on a judgment of conviction that [is] subject to the possibility of" further direct review. *Burch*, 202 F.3d at 1276-1277. Parallel direct and collateral proceedings threaten to "delay[] the ultimate resolution of both direct and collateral review," *Kapral*, 166 F.3d at 572-573, and create the risk of inconsistent outcomes. Although this Court grants certiorari in only a small percentage of cases, commencing a collateral attack while direct review is ongoing is "wasteful and pointless" if the conviction is reversed by this Court. *Id.* at 572. Indeed, even if the outcome on direct review is not in the defendant's favor, it may "cause the defendant to limit or rethink the claims that would be raised on collateral review, or even dissuade the defendant from seeking collateral review." *Ibid.*

The interpretation adopted by the Fourth and Seventh Circuits will also lead at least some defendants to prepare their Section 2255 motions and petitions for certiorari simultaneously, or at least to spend some of the time before the certiorari deadline considering the option of proceeding directly to collateral review. See *Kapral*, 166 F.3d at 578 (Alito, J., concurring). As the Eleventh Circuit has noted, "the 90-day period for seeking certiorari should be available to defendants so that they may *consider* whether to seek certiorari, assess the merits of their application for discretionary review, and discuss these issues with their counsel."

1980); *United States* v. *Davis*, 604 F.2d 474, 484-485 (7th Cir. 1979); *Jack* v. *United States*, 435 F.2d 317, 318 (9th Cir. 1970) (per curiam), cert. denied, 402 U.S. 933 (1971); *Welsh* v. *United States*, 404 F.2d 333, 333 (5th Cir. 1968) (per curiam); *Masters* v. *Eide*, 353 F.2d 517, 518 (8th Cir. 1965).

Kaufmann v. *United States*, 282 F.3d 1336, 1338 (11th Cir. 2002).

It is also fair and efficient that the limitation period for commencing a collateral attack under Section 2255 not start to run until the law that will govern the defendant's entitlement to post-conviction relief is settled. That occurs when the defendant's conviction becomes "final" for *Teague* purposes, which, as explained above, is when the time for seeking certiorari expires. See p. 16, *supra*. "[I]n the interest of the orderly administration of direct and collateral proceedings, the first day of the one-year limitations period logically should be the last day on which any applicable new rule could be decided." *Kapral*, 166 F.3d at 572; see *Garcia*, 210 F.3d at 1060. "Beginning the limitations period three months earlier," as the Fourth and Seventh Circuits would do, "might encourage prisoners to file habeas petitions before they know of all the possible Constitutional challenges available to them." *Kapral*, 166 F.3d at 572; see *Garcia*, 210 F.3d at 1060. Then, in order to attempt to avail themselves of new rulings, the prisoners would file either amendments to their Section 2255 motions or successive motions. There is no reason to believe that Congress intended such an inefficient result.

2. Defining finality under Section 2255 to occur only when time expires for the prisoner to petition this Court for review also makes sense because it treats federal prisoners the same as similarly-situated state prisoners. As noted, Section 2244(d)(1) runs the limitation period from when the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been denied. There is no reason to believe that Congress intended to give federal prisoners less time to initiate post-conviction proceedings than prisoners con-

victed in state courts. *Kapral*, 166 F.3d at 575 (there is "no principled reason to treat state and federal habeas petitioners differently"); accord *Garcia*, 210 F.3d at 1060.

3. The conclusion that a judgment of conviction does not become "final" until the time expires for seeking certiorari also accords with Section 2255 para. 6's core purpose of limiting the time for commencing a collateral attack. Although that construction of the limitation period gives prisoners who do not seek certiorari somewhat more time to commence a collateral attack than the interpretation adopted by the Fourth and Seventh Circuits, the difference is slight. A court of appeals normally issues its mandate 21 days after it enters judgment, so the difference between the two interpretations is only 69 days.[8] Because "the collateral review process will [not] be slowed in any meaningful way" even under the approach that allows defendants time "to consult with counsel and to consider whether it would be appropriate to exercise their right to seek certiorari," *Kapral*, 166 F.3d at 573, the choice between the two interpretations does not implicate "the congressional objective of imposing time limits where none previously existed," *id.* at 571.

Indeed, as the Eleventh Circuit has noted, the interpretation that treats a conviction as final when the court of appeals issues its mandate "create[s] a strong incentive for prisoners to file plainly frivolous petitions for certiorari for the sole purpose of extending their

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[8] Ordinarily, the mandate issues seven days after the denial of a petition for rehearing or the expiration of the time for seeking rehearing, see Fed. R. App. P. 41(b), which is typically 14 days after the entry of judgment, see Fed. R. App. P. 40 (a), but which may be lengthened by motion or by local rule in some circuits, see, *e.g.*, 11th Cir. R. 35-2.

time for habeas review." *Kaufmann*, 282 F.3d at 1338. The 69-day difference would disappear if defendants routinely filed petitions for writs of certiorari in order to prolong the time for initiating a collateral attack. Particularly in light of that likely consequence, interpreting "final" to encompass the time for seeking certiorari fully advances the AEDPA's purpose of limiting the time in which a federal prisoner may petition for post-conviction review.

C. Treating A Judgment Of Conviction As "Final" When The Court Of Appeals Issues Its Mandate Is Not Justified By The *Expressio Unius* Maxim

1. In holding that a judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) when the court of appeals issues its mandate, the Fourth and Seventh Circuits relied heavily on the *expressio unius est exclusio alterius* principle—that "expressing one item of [an] associated group or series excludes another left unmentioned," *United States* v. *Vonn*, 122 S. Ct. 1043, 1049 (2002). Those courts drew a negative implication from Congress's failure to include in Section 2255 the definition of "final" that Congress included in Section 2244(d)(1)(A). But the *expressio unius* maxim does not support the construction of Section 2255 para. 6(1) adopted by those courts, and the maxim is inapplicable here in any event.

Faced with the absence of a definition of "final" in Section 2255, the Seventh Circuit in *Gendron* compared the language of Sections 2244 and 2255 and concluded by negative implication that some other definition of finality must apply to Section 2255. See *Gendron*, 154 F.3d at 674 (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The *Gendron* court reasoned:

> As stated above, the period of limitations for § 2255 runs from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. In comparison, the period of limitations for petitions filed under § 2254 begins to run from "the date on which the judgment became final by the conclusion of direct review *or the expiration of time for seeking such review*[.]" 28 U.S.C. § 2244(d)(1)(A) (emphasis added). Thus, in drafting § 2244, Congress explicitly included the time for seeking leave to appeal with a state supreme court even if the petitioner elected not to do so. Such additional language is lacking in § 2255.

Id. at 674. As the court's placement of the emphasis suggests, the court read Section 2255 as if it referred to the date on which the conviction becomes "final by the conclusion of direct review." *Ibid.* The court therefore contrasted Section 2255 with Section 2244 on the ground that only Section 2244 contains the "additional language" referring to "the expiration of the time for seeking such review." From that premise, the court held that the "expiration" language, which is included in Section 2244's definition of finality but is not included in Section 2255's definition, does not apply to Section 2255 cases. Like the *Gendron* court, the Fourth Circuit also drew a negative implication from the absence of Section 2244's clarifying language in Section 2255, and it therefore also concluded that "final" means something different in Section 2255 than it means in Section 2244. See *Torres*, 211 F.3d at 839-840.

The textual premise upon which the reasoning of *Gendron* and *Torres* rests is, however, incorrect. Section 2255 does *not* define the term "final" as the date on which the conviction becomes final "by the con-

clusion of direct review." Rather, it does not define the term "final" at all. Thus, there is no basis for concluding that Congress intended a definition of "final" in Section 2255 that excludes a particular part of the definition of "final" set forth in Section 2244. See *Garcia*, 210 F.3d at 1060; *Burch*, 202 F.3d at 1278. Although the inclusion of only one part of the Section 2244(d)(1)(A) definition in Section 2255 might imply the intentional exclusion of the other, the omission of both portions does not. Cf. *Duncan* v. *Walker*, 533 U.S. 167, 171-173 (2001) (inclusion of "State" but not "Federal" in one provision, when other related provisions include the terms "State" and "Federal," implies intentional exclusion of "Federal" in first provision).

Rather, if the *expressio unius* principle were applied to Sections 2244(d)(1)(A) and 2255, it would lead to the conclusion that *neither* portion of the definition of "final" set forth in Section 2244(d)(1)(A) applies to Section 2255. Under that interpretation of Section 2255, a federal prisoner's judgment of conviction would become "final" without regard to direct review—*i.e.*, when the district court enters the judgment. See *Burch*, 202 F.3d at 1278; p. 21, *supra*; cf. 18 U.S.C. 3562(b) ("Notwithstanding the fact that a sentence of probation can subsequently be [modified, revoked or corrected,] a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes."). No court has adopted that construction of Section 2255. That is not surprising because the construction would lead to the absurd result that many federal defendants would have to seek post-conviction relief long before the conclusion of their direct appeals.

This Court has long counseled against the uncritical reliance on the *expressio unius* maxim reflected in the Fourth and Seventh Circuits' analysis. See, *e.g.*, *Ford*

v. *United States*, 273 U.S. 593, 612 (1927) (noting that the maxim is "a valuable servant, but a dangerous master" and should not be applied when it "leads to inconsistency or injustice"). The Court has not hesitated to conclude that "*[e]xpressio unius* just fails to work" in situations like this one, where the language of the statute and the context indicate that the maxim should not apply, or where it would produce nonsensical results. *Chevron U.S.A. Inc.* v. *Echazabal*, 122 S. Ct. 2045, 2051 (2002); see *Burns* v. *United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

The definition of "final" in Section 2244(d)(1)(A) accords with the structure and purpose of the AEDPA, including Section 2255 para. 6(1), and comports with the well-settled definition used by this Court in its retroactivity jurisprudence. There is no plausible reason why Congress would have chosen a different definition of "finality" to apply to federal prisoners under Section 2255 than to state prisoners under Section 2244. And the definition that the Fourth and Seventh Circuits have attributed to Congress would constitute a sharp break from the practice of rarely, if ever, allowing the commencement of collateral attacks while direct review is still pending. In view of those considerations, the failure of Congress to reiterate in Section 2255 the definition of final that it included in Section 2244 cannot support the conclusion that Congress intended a different definition to apply to Section 2255.

The more natural and more sensible inference is that Congress expected that the definition of "final" in Section 2244 would apply to that term when used later

in the statute. See pp. 19-20, *supra*; *e.g.*, *Sorenson*, 475 U.S. at 860; *Erlenbaugh*, 409 U.S. at 243. "As one court has aptly put it, '[n]ot every silence is pregnant.'" *Burns*, 501 U.S. at 136 (quoting *Illinois Dep't of Pub. Aid* v. *Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)). Congress's failure to include the definition in Section 2255 likely signified "merely an expectation that nothing more need[ed to] be said in order to effectuate [its] legislative objective." *Ibid.*[9]

2. The Fourth Circuit in *Torres* also found support for its interpretation in the contrasting language of Section 2255 and 28 U.S.C. 2263. Section 2263 governs habeas petitions filed by state prisoners serving capital sentences in States that qualify for expedited collateral review procedures. It provides that habeas petitions must be filed "not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." 28 U.S.C. 2263(a). The Fourth Circuit thought it "significant that Congress did not choose, as it did in § 2263, to use language in § 2255 that affirmatively expands the period of time before the start of the limitation period for filing a § 2255 motion." 211 F.3d at 840. By negative implication, the court con-

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[9] It is also possible that the omission of the clarifying material from Section 2255 para. 6(1) was "the result of inadvertence or accident." *Ford*, 273 U.S. at 612. As this Court has noted, "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting." *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997). Indeed, the Tenth Circuit has noted that the legislative record surrounding the adoption of the limitation provisions suggests that the "hypothesis of careful draftsmanship" upon which the *expressio unius* principle is premised may well be inapplicable here. *Burch*, 202 F.3d at 1277 (quoting *Kapral*, 166 F.3d at 579 (Alito, J., concurring)).

cluded that Congress did not intend the commencement of the limitation period under Section 2255 to wait until the time for seeking further direct review expires. *Ibid.*

That application of the *expressio unius* maxim is even more flawed than its application in the context of Section 2244(d)(1)(A). To begin with, there is essentially the same problem as in the Section 2244(d)(1)(A) context. Section 2255 para. 6(1) refers to *neither* of the two events that Section 2263 identifies as possible starting points for the limitation period—"affirmance of the conviction on direct review" and "the expiration of the time for seeking such review." Thus, reasoning by negative implication from Section 2263 does not justify the conclusion that the limitation period in Section 2255 para. 6(1) begins to run at one of those times rather than the other. See pp. 27-28, *supra*.

In addition, there is a problem that is not present in the context of Section 2244(d)(1)(A). Section 2263 is quite different in language and structure from Section 2255 para. 6(1). Most notably, Section 2263 ties the applicable period of limitation to "affirmance" of the conviction, while Section 2255 para. 6(1) ties the limitation period to when the conviction "becomes final." See *Torres*, 211 F.3d at 845 (Hamilton, S.J., dissenting) (citing *Kapral*, 166 F.3d at 576). It is thus particularly inappropriate to draw negative inferences from Section 2263 about the meaning of that critical phrase in Section 2255 para. 6(1). See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2234 (2002) ("The *Russello* presumption—that the presence of a phrase in one provision and its absence in another reveals Congress' design—grows weaker with each difference in the formulation of the provisions under inspection.").

To the extent that Section 2263 sheds any light on the meaning of Section 2255 para. 6(1), it supports the interpretation endorsed by the majority of the courts of appeals, not the interpretation adopted by the Fourth and Seventh Circuits. The existence of Section 2263, with its expedited limitation period linked to the conclusion of state court review, may explain why Congress felt it necessary to be particularly clear about when the limitation period in Section 2244(d)(1)(A) begins to run. Section 2244(d)(1)(A), like Section 2263, applies to state prisoners. Congress may therefore have been concerned that, absent clarifying language in Section 2244(d)(1)(A), courts would assume that the limitation period in that section begins at the same time as the limitation period in Section 2263. Congress would, however, have seen no need for clarifying language in Section 2255. Unlike Section 2263, Section 2255 applies to federal prisoners. Furthermore, as discussed above, because of the parallel language and structure of Section 2255 para. 6(1) and Section 2244(d)(1)(A), Congress could expect the courts to apply under Section 2255 para. 6(1) the same definition of "final" that Congress provided in Section 2244(d)(1)(A).

D. Petitioner's Motion Under Section 2255 Was Timely

In sum, consistent with the text and structure of AEDPA, the background definition of finality long approved by this Court, and the orderly administration of post-conviction review, a federal judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) only when the possibility of further direct review is exhausted. Thus, because petitioner did not file a petition for a writ of certiorari on direct appeal, his judgment of conviction became final when the time

within which he could file a petition expired. That occurred on February 22, 1999—90 days after the court of appeals affirmed his convictions. See Sup. Ct. R. 13.1. Petitioner filed his initial Section 2255 motion on February 22, 2000—exactly one year after his judgment of conviction became final. Therefore, contrary to the decision of the court of appeals, petitioner's initial Section 2255 motion was timely filed.[10]

Further proceedings in the court of appeals are warranted, however, to determine whether that court should nonetheless affirm the district court's judgment denying petitioner's Section 2255 motion. As the court of appeals noted in its opinion, Pet. App. 3a, and the government advised this Court in its brief in opposition, Br. in Opp. 11, petitioner failed to address the underlying claims on which the district court had granted him a certificate of appealability in any of his briefs in the court of appeals. Petitioner therefore abandoned those claims and is not entitled to Section 2255 relief. See Br. in Opp. 11-12; Fed. R. App. P. 28(a)(9); *Hojnacki* v. *Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002).

[10] In contrast, petitioner's motion to amend and proposed amendment to the Section 2255 motion were not timely filed. They were submitted on May 4, 2000, well after the one-year limitation period had run. Further, they assert claims that do not arise out of the same "conduct, transaction, or occurrence" as the initial claims and therefore do not relate back to the initial motion under Rule 15(c) of the Federal Rules of Civil Procedure. Petitioner has not challenged that conclusion before this Court.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded to that court for further proceedings.

Respectfully submitted.

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