No. 20-588

In the Supreme Court of the United States

LYNEAL WAINWRIGHT, WARDEN

Petitioner,

v.

JASON S. SEXTON,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can federal courts award habeas relief based on errors in state-postconviction proceedings?

2. If errors in state-postconviction proceedings sometimes provide a basis for habeas relief, can a habeas petitioner win relief based on such errors even if he did not diligently pursue the proceedings in which the errors occurred?

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REPLY

This case affords the Court an opportunity to resolve an entrenched circuit split on an important issue of federal law. *See* Pet.8–17. Specifically, it presents the question whether federal courts may award habeas relief based on errors in state-postconviction proceedings. Most circuits answer this question in the negative, though a minority disagree. *Compare Word v. Lord*, 648 F.3d 129, 131 (2d Cir. 2011) (*per curiam*); *accord Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004); *Sigmon v. Stirling*, 956 F.3d 183, 193–94 (4th Cir. 2020); *Kinsel v. Cain*, 647 F.3d 265, 273 & n.32 (5th Cir. 2011); *Bell-Bey v. Roper*, 499 F.3d 752, 756 (8th Cir. 2007); *Ortiz v. Stewart*, 149 F.3d 923, 939 (9th Cir. 1998); *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998), *with Montgomery v. Meloy*, 90 F.3d 1200, 1206 (7th Cir. 1996) (*per curiam*); *Flores-Ramirez v. Foster*, 811 F.3d 861, 866 (7th Cir. 2016) (*per curiam*); *Dickerson v. Walsh*, 750 F.2d 150, 152–53 (1st Cir. 1984); *Tevlin v. Spencer*, 621 F.3d 59, 70 (1st Cir. 2010); *see also Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007) *and DiCenzi v. Rose*, 452 F.3d 465, 469 (6th Cir. 2006).

Jason Sexton says the Court should decline the chance to resolve this longstanding split. He provides just two arguments in support of his position. *First*, Sexton says that it is "debatable" whether the circuits are really split. BIO.6. *Second*, Sexton says that the question is not presented here because he is not seeking habeas relief based on any error that occurred during state-postconviction proceedings. Both arguments are incorrect. This Court should grant the Warden's petition.

I. The circuit split that this case implicates is significant, longstanding, and acknowledged by the lower courts.

Sexton claims it is "unclear" whether "a circuit split exists regarding the application of § 2254 to state postconviction relief." BIO.6. Sexton is wrong. For proof, look no further than decisions from the lower courts, which acknowledge the circuit split. In *Word v. Lord*, 648 F.3d. 129, the Second Circuit embraced the "majority" rule that "errors in state post-conviction proceedings do not provide a basis for" habeas relief. *Id*. at 131. In doing so, it expressly parted ways with the "First and Seventh Circuits," which it recognized had "rejected a *per se* rule that federal habeas review does not extend to claims arising from state post-conviction proceedings." *Id*. at 131 n.5. The Seventh Circuit agrees with that characterization. In one recent case, it observed that, "[a]lthough a majority of the courts of appeals have concluded 'that errors in state-postconviction proceedings do not provide a basis for redress under §2254,'" its own court had "not adopted this per se rule." *Flores-Ramirez*, 811 F.3d at 866 (quoting *Word*, 648 F.3d at 131). "Instead," the rule in the Seventh Circuit is that errors in state-post-conviction proceedings *can* give rise to a habeas claim if the state-postconviction court "violates some independent constitutional right, such as the Equal Protection Clause." *Id*. (quoting *Montgomery*, 90 F.3d at 1206).

Other circuits have long acknowledged the split, as well. *See, e.g.*, *Kenley v. Bowersox*, 228 F.3d 934, 2000 U.S. App. LEXIS 23867, *15 (8th Cir. 2000), *vacated on other grounds by* 234 F.3d 1339 (8th Cir. 2000); *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999); *Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989);

Hopkinson v. Shillinger, 866 F.2d 1185, 1218–19 (10th Cir. 1989); *Bryant v. Maryland*, 848 F.2d 492, 493 (4th Cir. 1988); *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1986).

Sexton additionally argues that, even if there is a split, the disagreement "is largely academic and substantially insignificant." BIO.6. This is so, he says, because "state postconviction proceedings may only be reviewed" under the First and Seventh Circuit's approach "if an independent constitutional right is violated." BIO.6–7. In fact, the split is neither academic nor insubstantial. The split does not present a merely academic issue because its resolution will have real-world effects. This case proves the point. Sexton is seeking habeas relief for alleged constitutional errors that occurred during his state-postconviction proceedings; he says the state courts violated the Fourteenth Amendment by rejecting his request to file a delayed appeal. That claim necessarily fails under the majority approach, but is potentially viable under the minority rule. And the decision whether to adopt the majority or minority rule is important, not insignificant; the answer will affect the finality of state criminal convictions, which this Court has recognized to be of great significance. *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

II. This is a good vehicle for resolving the circuit split.

A case presenting a longstanding circuit split on an important issue of federal law is a good candidate for this Court's review. *See* Rule 10; *see, e.g.*, *Banister v. Davis*, 140 S. Ct. 1698, 1705 (2020); *Wilson v. Sellers*, 138 S. Ct. 1188, 1193 (2018). Understandably, then, Sexton argues that this case does not truly present the

question on which the circuits are divided. Sexton claims that he is *not* seeking habeas relief based on an error in state-postconviction proceedings. According to Sexton, his state-court request to file a delayed appeal was not a form of postconviction relief at all. Therefore, he argues, the question whether an error in state-postconviction proceedings can give rise to a habeas claim never arises. BIO.7–11.

Sexton's argument fails. In claiming that his state-court motion to file a delayed appeal was not a form of postconviction relief, Sexton invokes Ohio law. He claims that Ohio courts do not consider such requests to be requests for postconviction relief. Sexton is incorrect about the manner in which Ohio characterizes such requests. More fundamentally, even if his characterization were accurate, the label that Ohio courts attach to such motions has no bearing on the presentation of the issue on which the circuits are split. This brief considers both of these problems with Sexton's argument in turn.

A. Sexton is wrong about the way Ohio law characterizes requests for permission to file a delayed appeal.

Ohio courts (and the Sixth Circuit) treat requests for permission to file a delayed appeal as requests for state-postconviction relief. The many cases Sexton cites are not to the contrary. They establish the proposition that *if* a court grants a motion to file a delayed appeal, then the delayed appeal the petitioner wins is indistinguishable from a direct appeal. *State v. Silsby*, 119 Ohio St. 3d 370, 373 (2008) (cited at BIO.8); *accord State v. Williams*, 2006-Ohio-5415, ¶¶7–8 (Ohio Ct. App. 2006) (cited at BIO.8). What Sexton fails to appreciate is that Ohio courts view the

request itself as a "form[] of postconviction relief." *Silsby*, 119 Ohio St. 3d at 372. Just like many other forms of state-postconviction relief, a request to file a delayed appeal, if successful, entitles the petitioner to begin or restart direct proceedings anew. And just like all other forms of state-postconviction relief, the request to resume or reopen direct proceedings is not *itself* a direct proceeding, but rather a form of collateral attack. For this reason, the Sixth Circuit has unequivocally held—numerous times, rather than in a "single line," BIO.8—that such requests *are* a form of postconviction relief for purposes of federal habeas law. *See Board v. Bradshaw*, 805 F.3d 769, 771–72 (6th Cir. 2015) (holding that a motion for leave to file a delayed appeal "is considered part of the collateral review process for purposes of tolling AEDPA's statute of limitations"); *DiCenzi v. Rose*, 452 F.3d 465, 468 (6th Cir. 2006); *Anderson v. Brunsman*, 562 Fed. Appx. 426, 429–30 (6th Cir. 2014); *Applegarth v. Warden N. Cent. Corr. Inst.*, 377 Fed. App'x 448, 449–50 (6th Cir. 2010); *McFarlane v. Harris*, No. 19-3899, 2020 U.S. App. LEXIS 1851 *5–6 (6th Cir. Jan. 21, 2020).

Thus, as a matter of Ohio law, a request to file a delayed appeal is a form of postconviction relief.

B. This case would present the issue on which the circuits are split even if Sexton were *correct* about the way Ohio law characterizes requests for permission to file a delayed appeal.

The more fundamental problem with Sexton's argument is that it is irrelevant: it would not matter if he were right about the label that Ohio courts apply to requests for permission to file a delayed appeal.

The reason is that the circuit split that the Warden asks this Court to resolve is presented here *regardless* of how Ohio courts label requests to file delayed appeals. Recall the debate at the heart of the circuit split. The majority view—the view that "errors in state post-conviction proceedings do not provide a basis for" habeas relief," *Word*, 648 F.3d. at 131—is not based on the meaning of the phrase "post-conviction proceedings." It instead rests on the meaning of "custody." Under 28 U.S.C. §2254(a), courts may "entertain" habeas petitions brought by people "in custody pursuant to the judgment of a State court" who seek relief "on the ground that" they are "in custody in violation of the Constitution or laws or treaties of the United States." No one is "in custody" pursuant to a judgment issued in a collateral proceeding. After all, those who collaterally attack their convictions are, by definition, *already in* custody. Thus, the reasoning goes, habeas petitions challenging errors that occur during collateral state proceedings are not errors by virtue of which a person is put in "custody." *See, e.g.*, *Word*, 648 F.3d. at 131.

That reasoning applies here—and it applies regardless of whether one labels Sexton's request to file a delayed appeal a "postconviction" proceeding. Whatever one calls that request, Sexton is not in custody pursuant to the proceedings adjudicating that request. He was already in custody, just like the petitioners whose cases failed under the rule in the majority of circuits. And, just like those petitioners, he sought to be freed from custody via a state-conferred procedural mechanism—in his case, a request to file a delayed appeal—that the State was under no obligation to "provide" at all. *Word*, 648 F.3d at 131 (citing *Lackawanna Cnty. Dist. Att'y v. Coss*, 532 U.S. 394,

402 (2001)). As was true of those petitioners, Sexton claims his attempt to collaterally attack his conviction—to resume or reopen or undo earlier direct proceedings—failed because of some constitutional error in the state-court mechanism. Thus, this case presents the very same question their cases presented: Can errors made during state proceedings in which a petitioner seeks to collaterally attack his conviction give rise to habeas relief? Whether to label his collateral attack a "postconviction" proceeding is irrelevant to the question presented. *Contra* BIO.9–10.

There might have been a vehicle problem if the state courts had *granted* the request to file a delayed appeal and then made an error during the reinstated appeal. That would be rather like an error made during a new trial ordered by a state-postconviction court. In such a case, the petitioner would have a good argument that he *is* in "custody" pursuant to the error made in the reopened direct proceedings. But that is not what happened. The state court here *denied* Sexton's request to file a delayed appeal, and so the direct proceedings never resumed. Sexton, in other words, is in precisely the same position as any of the petitioners whose claims failed under the rule in the majority of circuits: he sought to collaterally attack his conviction, failed, and now seeks habeas relief based on alleged constitutional problems with the collateral proceedings. There is no vehicle problem; the circuit split is cleanly presented.

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In sum, this case presents an opportunity to resolve a longstanding circuit split on a matter of federal importance. Sexton has not identified any problem that would prevent the Court from reaching and

resolving that circuit split. And he does not deny that this vehicle has at least two major advantages relative to past cases presenting the same question. First, because the State lost below, there is no risk that a grant of *certiorari* will needlessly prolong a habeas case that should not be allowed to proceed in the first place. *See* Pet.12–13. Second, if the Court resolves the circuit split in Sexton's favor, this case gives it the option to discuss a second, follow-on question: If a petitioner seeks habeas relief based on an error in state-postconviction proceedings, can the petitioner win federal habeas relief even if he did not diligently pursue the proceedings in which the error occurred? *See* Pet.17–21. Because this case presents an important issue and provides a good vehicle for resolving that issue, the Court should grant the Warden's petition for a writ of *certiorari*.

CONCLUSION

The Court should grant the petition for *certiorari*.

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