

No. 23-6255

Supreme Court, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID ALEXANDER HUNTER,  
Petitioner,

vs.

BOBBY LUMPKIN, Director,  
Texas Department of Criminal Justice,  
Correctional Institutions Division,  
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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**ORIGINAL**

QUESTION PRESENTED FOR REVIEW

The United States Constitution, through the Suspension Clause and the Fourteenth Amendment, guarantees to prisoners the right to federal habeas corpus review of state convictions. U.S. CONST. art. I, § 9, cl. 2, amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year limitation for prisoners to file habeas corpus petitions, which is triggered by conclusion of "direct review," as well as a requirement to exhaust all claims in state court. 28 U.S.C. §§ 2244(d)(1)(A), 2254(b)(1)(A).

In many states, prisoners are not allowed to raise on direct appeal claims of ineffective assistance, but must instead wait until a state initial-review collateral proceeding ("IRCP") to raise them in the first instance. Martinez v. Ryan, 566 U.S. 1, 8, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); see also Trevino v. Thaler, 569 U.S. 413, 429, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013) (extending Martinez rule based on Texas's "procedural framework" preventing review of ineffective-counsel claims until the IRCP).

The Supreme Court described the state-created IRCP as "in many ways the equivalent of [prisoners'] direct appeal[s] as to the ineffective-assistance claim[s]." Martinez v. Ryan, 566 U.S., at 11.

Therefore,

Is the AEDPA's one-year limitation period for state prisoners to raise claims of ineffective assistance of counsel triggered by conclusion of "direct appeal-equivalent" initial-review collateral proceedings described in Martinez v. Ryan in favor of conclusion of direct appeal proceedings in which review of such claims is barred by the State?

LIST OF PARTIES IN COURT BELOW

The caption set out above contains the names of all of the parties in this case in the court below.

LIST OF CASES DIRECTLY RELATED TO THIS CASE

1. In the United States Court of Appeals for the Fifth Circuit, David Alexander Hunter v. Bobby Lumpkin, No. 21-20599, application for COA denied April 17, 2023.
2. In the United States District Court for the Southern District of Texas, Houston Division, David Alexander Hunter v. Bobby Lumpkin, No. 4:21-cv-00437, federal habeas corpus dismissal entered October 27, 2021.
3. In the Texas Court of Criminal Appeals, Ex parte David Alexander Hunter, No. WR-90,489-02, second state habeas corpus application dismissed December 9, 2020.
4. In the Texas Court of Criminal Appeals, Ex parte David Alexander Hunter, No. WR-90,489-01, first state habeas corpus application denied January 8, 2020.
5. In the Texas Court of Criminal Appeals, In re David Alexander Hunter, No. PD-1573-13, petition for discretionary review refused March 12, 2014.
6. In the Court of Appeals for the Ninth District of Texas, David Alexander Hunter v. The State of Texas, No. 09-11-00691-CR, convictions affirmed September 25, 2013.
7. In the 410th Judicial District Court of Montgomery County, Texas, The State of Texas v. David Alexander Hunter, No. 10-07-08140-CR, Cts. I and II, judgments of conviction entered November 4, 2011.

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CITATIONS OF OPINIONS AND ORDERS IN CASE

1. The judgments of conviction by the state trial court were not reported but are set forth at Appendix pp. 8-9, 10-11.
2. The opinion affirming convictions by the state intermediate appellate court is reported at 2013 Tex. App. LEXIS 11992 (Tex. App.—Beaumont Sept. 25, 2013), and is also set forth at Appendix pp. 13-27.
3. The refusal of the petition for discretionary review by the Texas Court of Criminal Appeals is reported at 2014 Tex. Crim. App. LEXIS 310 (Tex.Crim.App. March 12, 2014), and is also set forth at Appendix p. 29.
4. The findings of fact and conclusions of law by the state habeas court on the first habeas application was not reported but is set forth at Appendix pp. 31-40.
5. The denial by the Texas Court of Criminal Appeals of the first habeas application was not reported but is set forth at Appendix p. 41.
6. The denial by the Texas Court of Criminal Appeals of the habeas rehearing motion was not reported but is set forth at Appendix p. 61.
7. The denial by the Texas Court of Criminal Appeals of the motion to restore attorney-client communications was not reported but is set forth at Appendix p. 72.
8. The termination by the state habeas court of habeas counsel's appointment was not reported but is set forth at Appendix p. 71.
9. The findings of fact and conclusions of law by the state habeas court on the second application was not reported but is set forth at Appendix pp. 43-48.
10. The dismissal by the Texas Court of Criminal Appeals of the second habeas application was not reported but is set forth at Appendix p. 49.

11. The dismissal by the United States District Court for the Southern District of Texas, Houston Division, of the federal habeas petition was not reported but is set forth at Appendix pp. 51-59.

12. The denial by the United States Court of Appeals for the Fifth Circuit of the application for a certificate of appealability is reported at 2023 U.S. App. LEXIS 15184 (5th Cir. April 17, 2023), and is also set forth at Appendix pp. 4-5.

13. The order denying, in part, and granting, in part, by the United States Court of Appeals for the Fifth Circuit of the request for extension to file rehearing petition was not reported but is set forth at Appendix p. 132.

14. The denial, after reconsideration, by the United States Court of Appeals for the Fifth Circuit of the extension request is reported at 2023 U.S. App. LEXIS 15196 (5th Cir. May 31, 2023), and is set forth at Appendix p. 136.

15. The denial by the United States Court of Appeals for the Fifth Circuit for leave to file out-of-time rehearing petition is reported at 2023 U.S. App. LEXIS 15173 (5th Cir. June 15, 2023), and is also set forth at Appendix pp. 183-84.

#### JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability was entered on April 17, 2023.

A timely petition for rehearing was not filed. Leave to file out-of-time rehearing petition was denied.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Suspension Clause of the United States Constitution guarantees that:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. CONST. art. I, § 9, cl. 2.

2. Section 1 of the Fourteenth Amendment to the United States Constitution guarantees, in relevant part, that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

3. The statutes under which Petitioner was prosecuted, though nothing here turns on their terms, are Sections 21.11(a)(2) and 22.021(a)(1)(B) of the Texas Penal Code, which are set forth at Appendix pp. 193-95 because of their length.

4. The statute under which Petitioner sought state habeas corpus relief is Article 11.07 of the Texas Code of Criminal Procedure, and is set forth at Appendix pp. 190-92 because of its length.

5. The statute under which Petitioner sought federal habeas corpus review is 28 U.S.C. § 2254, and is set forth at Appendix pp. 188-89 because of its length.

## STATEMENT OF THE CASE

The facts necessary to place in its setting the question now raised can be briefly stated as:

### I. The course of proceedings in the Section 2254 case now before the Court.

In 2011, Hunter was convicted in state court for felony sex offenses. App. pp. 8-11. The convictions were affirmed by the intermediate state appellate court, and the Texas Court of Criminal Appeals ("TCCA") refused discretionary review on March 12, 2014. App. pp. 13-27, 29. Hunter did not seek certiorari in the Supreme Court, and the time for him to have done so expired 90 days after the TCCA's refusal, June 10, 2014. See Supreme Court Rule 13.1.

On April 10, 2019, Hunter filed a counseled state application for habeas corpus comprised of only claims of ineffective assistance of counsel ("IAC"). The state habeas court recommended denial, which TCCA Judge Marylou Keel accepted, denying relief on January 8, 2020. App. pp. 31-40, 41. The time for Hunter to have requested certiorari expired 150 days<sup>1</sup> after the TCCA denied his rehearing motion<sup>2</sup>, June 18, 2020. App. pp. 61-63.

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1. See Rules of the Supreme Court of the United States-Miscellaneous Order Addressing the Extension of Filing Deadlines [COVID-19], 334 F.R.D. 801, 589 U.S. \_\_\_\_ (2020) (extending the period to file a petition for certiorari from 90 days to 150 days for petitions due on or after March 20, 2020). App. pp. 198-99.
2. See Supreme Court Rule 13.3, which predicates the time to seek "direct appeal" certiorari on, when applicable, denial of a state-court rehearing; and Wilson v. Cain, 564 F.3d 702, 706 (5th Cir. 2009), which predicates the 28 U.S.C. § 2244(d)(1)(A) "trigger date" for Texas cases on, as applicable, denial of a rehearing request on the IRCP.

Meanwhile, due to his inability to communicate with appointed counsel (App. pp. 65-72), Hunter filed a pro se supplemental application on January 6, 2020, adding only IAC claims, which was dismissed by the TCCA on December 8, 2020 as a "subsequent" application barred by Texas's statutory abuse of writ doctrine despite the State's failure to show that Hunter mailed his application too late. App. pp. 43-48, 49, 190-92.

A month later, on January 8, 2021, Hunter mailed his pro se § 2254 petition advancing only the IAC claims raised in his two state habeas corpus applications. App. pp. 74-95. Respondent Lumpkin challenged the timeliness of Hunter's petition, to which Hunter replied. App. pp. 97-106. District Court Judge Alfred H. Bennett dismissed the petition as untimely, finding the AEDPA limitation period had expired June 10, 2015, one year after the deadline for Hunter to have sought certiorari from the TCCA's discretionary review refusal, and also denied a certificate of appealability ("COA") on substantially the same question posed here. App. pp. 51-59.

Hunter filed a timely notice of appeal in the district court and an application for a COA in the court of appeals. App. pp. 108-10, 112-27. Fifth Circuit Judge Don R. Willett denied the COA application on April 17, 2023. App. pp. 5-6.

Hunter sought a 30-day extension of time to request rehearing in accordance with Fifth Circuit Rule 27.1.1. and its I.O.P. (at para. 12) (App. pp. 196-97), which the case manager granted for only 14 days. Upon reconsideration, Judge Willett denied an extension up to the originally-requested 30 days, or through May 31, 2023. App. pp. 134-35, 136.

A panel consisting of Senior Circuit Judge James L. Dennis and Circuit Judges Carl E. Stewart and Willett denied Hunter's motion for leave to file his out-of-time petition for en banc rehearing, which the court received on May 30, 2023, the day before Judge Willett denied a 30-day extension. App. pp. 138-82, 183-84.

This petition for certiorari timely follows.

II. Existence of jurisdiction below.

Hunter was convicted in the 410th Judicial District Court of Montgomery County, Texas, for two felony offenses prohibited by Sections 21.11(a)(2)(A) and 22.021(a)(1)(B) of the Texas Penal Code. App. pp. 8-9, 10-11, 193, 194-95.

Hunter filed two state applications for habeas corpus relief pursuant to Texas Code of Criminal Procedure Article 11.07 which were finally resolved by the TCCA. App. pp. 41, 49, 190-92.

Hunter filed a 28 U.S.C. § 2254 petition in the United States District Court, followed by notice of appeal, and application for COA in the United States Court of Appeals for the Fifth Circuit. App. pp. 74-95, 108-10, 112-27.

III. The court of appeals has refused to review an important question of federal law that has not been, but should be, settled by this Court.

This is an AEDPA statute-of-limitations case. At the time Hunter filed his § 2254 petition, the Court had already described IRCPs—including Texas's—as "in many ways the equivalent of the prisoner's direct appeal as to [IAC] claim[s]." Martinez v. Ryan, 566 U.S., at 11. However, the Court has not yet explicitly held that the IRCP should be characterized as the "direct review" of IAC claims in order to properly calculate the "trigger date" mandated by § 2244(d)(1)(A).

The district court relied on distinguishable cases when it dismissed Hunter's petition as untimely despite the fact that it was filed only 10 months after the TCCA denied rehearing of his first "direct appeal-equivalent" IRCP application, and well before the end of his "direct appeal" certiorari window for his second IRCP application. App. pp. 55-56.

Both the district court and the court of appeals refused to find that the procedural question was debatable by jurists of reason and, thus, worthy of review. App. pp. 5-6, 58-59.

Similarly, and as Hunter describes below, hundreds of other state prisoners across America who also seek federal review of their IAC claims are regularly turned away from the court as a result of the unnecessary extra-statutory limitation of federal judicial power to enforce Constitutional protections.

The States' laws and regulations determine which errors are cognizable on direct appeal and which must be delayed until collateral review. Therefore, prisoners in different states are not able to access federal courts in an equal manner. Because such laws and rules artificially narrow federal powers to review state-court decisions, implicating the Suspension Clause and the Fourteenth Amendment, Petitioner Hunter respectfully urges this Court to grant certiorari to decide the important question of whether a "direct appeal-equivalent" IRCP is the "direct review" of IAC claims contemplated by Congress when it enacted the AEDPA.

ARGUMENT FOR ALLOWANCE OF WRIT

This Court's characterization of Texas's and other states' collateral review proceedings as the equivalent of direct appeal for IAC claims defines the § 2244(d)(1)(A) "trigger date."

Consequent to this Court's IRCP definition, the time to file a "direct review" certiorari petition after conclusion of a "direct appeal-equivalent" IRCP should also be considered when analyzing the two § 2244(d)(1)(A) prongs<sup>3</sup> for finality. Accord Clay v. United States, 537 U.S. 522, 123 S.Ct. 1072, 155 L.Ed.2d 99 (2003) (holding that "direct review" certiorari is part of the direct appeal for purposes of finality); and contra Lawrence v. Florida, 549 U.S. 327, 337, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (holding that direct certiorari from (non-IRCP) state habeas proceedings does not provide tolling under § 2244(d)(2)).

This Court has also before determined that a similar, but not dispositive, procedural question was worthy of debate when it granted certiorari in Jimenez v. Quarterman (552 U.S. 1256, 128 S.Ct. 1646, 170 L.Ed.2d 352 (2008)) after the Fifth Circuit denied a COA. Jimenez v. Quarterman, 555 U.S. 113, 118, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009). There, Jimenez argued, and the Court

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3. "The text of §2244(d)(1)(A) ... consists of two prongs.... For petitioners who pursue direct review all the way to this Court, the judgment becomes final at the 'conclusion of direct review'—when this Court affirms a conviction on the merits or denies a petition for certiorari. For all other petitioners, the judgment becomes final at the 'expiration of the time for seeking such review'—when the time for pursuing direct review in this Court, or in state court, expires." Gonzalez v. Thaler, 565 U.S. 134, 150, 132 S.Ct. 641, 181 L.Ed.2d 619 (2012).

agreed, that the TCCA's decision on collateral review to grant leave to file an out-of-time petition for discretionary review reset the § 2244(d)(1)(A) "trigger date." Jimenez v. Quarterman, 555 U.S., at 121.

The Court's decision to reverse the Fifth Circuit's refusal of a COA on Jimenez's procedural question was unanimous. Id.

Additionally, review of Hunter's question falls squarely within the Court's discretion because of the national importance of equal access to federal habeas review of state convictions.

Hunter presented to the Fifth Circuit evidence of the broad impact of improper calculation of § 2244(d)(1)(A) "trigger dates" as part of his proposed rehearing petition. App. pp. 138-82.

As shown there, LexisNexis reports that, in pre-pandemic 2019, at least 18 habeas petitions were dismissed as untimely in the Houston Division, where the court included filing and disposition dates and noted that petitioners had raised IAC claims. See App. pp. 179-82 for cases. Of the 18, only three were filed more than one year after the "expiration of the time for seeking [direct] review" by way of certiorari petitions to this Court after final disposition of the "direct appeal-equivalent" IRCPs in state court. (IRCP rehearing requests, if any, were not referenced in the reported dismissal recommendations and orders.)

Eighty-three percent of petitions seeking federal review of state-court denials of IAC claims were erroneously denied as untimely by the Houston Division in 2019.

LexisNexis also reports 985 entries in 2019 from all federal district courts that each contain relevant words and phrases.<sup>4</sup> Extrapolating the Houston Division's 83% dismissal rate, it is reasonable to infer that up to 817 prisoners were erroneously denied federal review in 2019 alone, with likely similar volumes every year since 1997, one year after the AEDPA's enactment.

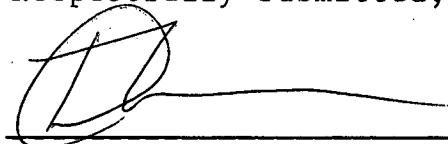
Finally, the proper holding suggested here would not upset precedents regarding consideration of non-IRCP proceedings<sup>5</sup> for limitations analyses any more than did Jimenez v. Quarterman, supra, only that true IRCPs should be included as part of the spectrum of "direct review" specified by Congress.

#### CONCLUSION

The procedural question here is one of national importance for all state prisoners attempting to invoke the federal judiciary's power to enforce the Constitutional guarantee of the right to effective assistance of counsel in state criminal proceedings.

This petition for a writ of certiorari should be granted.

Respectfully submitted,



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4. LexisNexis search parameters, terms: "2244(d)(1)!" and (dismiss! /s "with prejudice"); date range: 1/1/2019 through 12/31/2019; courts: federal district courts for all circuits.
5. I.e., state collateral proceedings in which IAC claims were not raised in the first instance, or those collateral proceedings which occur after the prisoner raises (and is granted review on)—or was allowed to raise—IAC claims during his conventional direct appeal.