

No. 17-8011

IN THE
Supreme Court of the United States

CARLTON J. BLOUNT,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR
COURT OF APPEALS-APPOINTED AMICUS
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether federal courts should take a functional approach to assessing whether a state court reopened direct appeal for purposes of computing the limitations period under the Antiterrorism and Effective Death Penalty Act of 1996;

2. Whether, absent a request by the government to be relieved of a mistaken concession that renders a habeas petition timely or a *sua sponte* finding of extraordinary circumstances to do so, a federal court of appeals lacks authority to disregard the government's concession and dismiss the petition as untimely;

3. Whether a federal habeas court acts improperly if it denies a certificate of appealability based on its resolution of the ultimate merits of the issue for which a certificate of appealability is sought.

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INTEREST OF AMICUS¹

Undersigned counsel of record, David M. Lehn, was appointed by the United States Court of Appeals for the District of Columbia Circuit to serve as amicus curiae in favor of petitioner. In that capacity, Mr. Lehn filed opening and reply briefs and presented oral argu-

¹ No counsel for a party authored this brief in whole or in part. Neither such counsel nor a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity other than amicus and his law firm made such a monetary contribution. Counsel of record for the parties received timely notice of amicus's intent to file this brief. The parties' letters consenting to the filing of this brief are on file with the Clerk.

ment. Although Mr. Lehn's appointment has concluded, he believes this Court would benefit from additional discussion of the issues presented by the *pro se* certiorari petition.

INTRODUCTION

Carlton Blount was convicted of murder in D.C. Superior Court—even though his trial counsel objected that the jury instruction unconstitutionally permitted conviction without the requisite *mens rea*; even though the jury instruction was later held unconstitutional in another case; and even though the government has never argued that there was sufficient evidence to find him guilty under a constitutionally valid instruction.

Unfortunately for Blount, his direct-appeal counsel did not pursue the objection on appeal—even though the instruction was, as the D.C. Court of Appeals acknowledged, “under active criticism and discussion at the time”; even though Blount had specifically directed his appellate counsel to raise the objection; and even though most of the arguments that appellate counsel did raise were so weak that the D.C. Court of Appeals “summarily dispose[d]” of them in a single footnote.

Blount has since filed two federal habeas petitions in the United States District Court for the District of Columbia on the ground that his direct-appeal counsel's failure to raise the preserved and meritorious constitutional objection to the jury instruction qualified as ineffective assistance of appellate counsel (“IAAC”). The district court dismissed the first petition for lack of exhaustion—erroneously, because the court should have held the petition in abeyance pending exhaustion—and dismissed the second as untimely. Blount's certiorari petition concerns the erroneous dismissal of his second habeas petition.

After the district court denied Blount a certificate of appealability ("COA") on its dismissal of the second habeas petition, Blount appealed to the United States Court of Appeals for the District of Columbia Circuit and sought a COA from that court, arguing (with Amicus's support) that his second habeas petition was timely because either the D.C. Court of Appeals had restarted the limitations clock by reopening his direct appeal via a motion to recall the mandate, or he was entitled to sufficient equitable tolling in light of his first habeas petition. In a published opinion, the panel voted 2-1 to reject those arguments and denied Blount a COA. Judge Williams dissented.

The ruling below conflicts with this Court's precedent in three ways. First, under *Jimenez v. Quarterman*, 555 U.S. 113 (2009), *Carey v. Saffold*, 536 U.S. 214 (2002), and *Buck v. Davis*, 137 S. Ct. 759 (2017), the court erroneously took a formalistic rather than functional approach to determine whether the D.C. Court of Appeals had reopened Blount's direct appeal. Second, under *Wood v. Milyard*, 566 U.S. 463 (2012), the court had no authority to *sua sponte* relieve the government of its concession (mistaken though it was) that Blount's first habeas petition had been timely filed, absent a finding that exceptional circumstances justified such relief. And third, under *Buck* the court erroneously denied the COA based on its resolution of the ultimate merits of the appealed issue rather than the requisite threshold assessment.

The petition for a writ of certiorari should be granted, and a COA issued, both because Blount deserves to have his potentially meritorious IAAC claim heard and because correction of the errors below will affect how lower courts resolve timeliness questions for countless federal habeas petitions.

Moreover, the second and third errors implicate this Court's power to supervise appellate courts' application of important federal standards. This Court has repeatedly sought to clarify and enforce these standards in the face of their misapplication—in *Wood and Buck*, as well as *Day v. McDonough*, 547 U.S. 198 (2006), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003). That the decision below so plainly contravenes these standards shows that those precedents may be insufficient to ensure lower courts' compliance. Consequently, this Court should consider summarily reversing the decision below on Questions Two and Three in light of *Wood and Buck* to emphasize the proper application of the standards they articulate.

STATEMENT

A. Factual Background²

1. Carlton Blount was charged with two counts of murder in D.C. Superior Court. “At trial, the government’s primary theory was that Blount alone shot the victims. Blount’s defense was that one of his friends pulled the trigger.” App.2a. As the trial progressed, it became evident that Blount had a legitimate defense to the prosecution’s primary theory. The government acknowledged that “on this record a reasonable juror could say, ‘we are not sure who the shooter is.’” C.A. JA87; *see also* C.A. JA69 (“I think a jury could find that ... they can’t necessarily agree on who the shooter is”). Indeed, the D.C. Court of Appeals later observed that Blount had “presented evidence, which if believed,

² This discussion focuses on the essential elements of this case’s lengthy procedural history. For a more complete treatment, *see* Amicus C.A. Br. 6-20, 40-44.

could establish that [someone else], not Carlton Blount was the shooter.” App.70a n.12.

Crediting that possibility, the trial judge instructed the jury that Blount could be guilty of murder as an *accomplice* if the homicide was the “natural and probable consequence[]” of some other crime “in which he intentionally participate[d],” even if he did not have “the same intent that the principal offender had.” App.2a. Blount’s trial counsel objected that the accomplice instruction “eliminated the *mens rea* element of the [murder] offense, violating the Sixth Amendment’s guarantee of a jury verdict on every element.” App.3a. The judge overruled the objection and gave the problematic accomplice instruction (as well as a principal instruction), and the jury convicted Blount of both murders in a general verdict. *Id.*

On direct appeal, Blount’s appellate counsel failed to raise Blount’s constitutional objection to the accomplice instruction. There was no legitimate justification for that failure, as the D.C. Court of Appeals later concluded. *See* App.73a (rejecting Blount’s contention that “his appellate counsel was justified in not raising the issue on direct appeal”). Blount had specifically directed his appellate counsel in writing to raise the objection, *see* C.A. JA142, JA144, and the objection was preserved and clearly had merit—as the D.C. Court of Appeals later observed, the instruction “was under active criticism and discussion at the time,” App.73a, and indeed in a subsequent case, *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006), “held unconstitutional the very same jury instruction used in Blount’s case, on the very grounds that Blount had raised at trial,” App.3a. Moreover, that objection was obviously far stronger than the three objections raised on appeal that the D.C. Court of Appeals “summarily dispose[d]” of in

as single footnote. App.64a, 70a n.12; *see* App.28a-29a (Williams, J., dissenting).

After Blount's convictions were affirmed, he filed a *pro se* motion for post-conviction relief under D.C. Code §23-110, asserting his constitutional objection to the accomplice instruction. App.3a-4a. Although the D.C. Court of Appeals had decided *Wilson-Bey* during the motion's pendency, the Superior Court denied Blount's motion, and the D.C. Court of Appeals affirmed, finding that the claim was "procedurally defaulted" because Blount had failed to raise it on direct appeal." *Id.*

Blount filed a *pro se* federal habeas petition asserting (among other things) an IAAC claim, which the district court dismissed for failure to exhaust. App.4a. In the District of Columbia, the mechanism to assert an IAAC claim is a motion to the D.C. Court of Appeals to recall the mandate issued on direct appeal. *Id.* Blount had not filed such a motion because, understandably, he did not grasp "the District's byzantine process for pursuing [IAAC] claims," App.32a (dissent), and the same direct-appeal counsel who had failed to raise the accomplice-instruction objection had also abruptly terminated his representation upon the denial of Blount's direct appeal without informing Blount of his options for post-conviction relief. *See* Amicus C.A. Br. 13-14, 35-36.³

Now aware of his obligations, Blount "diligent[ly] ... filed his [*pro se*] motion to recall just 31 days after the COA on his first [habeas] petition was denied." App.30a-31a (dissent). The D.C. Court of Appeals will

³ Direct-appeal counsel's failure to "advise [Blount] of such further legal remedies as may be available to him" was itself professionally deficient conduct. *Head v. United States*, 626 A.2d 1382, 1384 n.4 (D.C. 1993).

grant a recall motion if it has "on [its] face sufficient merit." *Watson v. United States*, 536 A.2d 1056, 1060 (D.C. 1987) (en banc). Upon receiving Blount's recall motion, the D.C. Court of Appeals issued an order stating:

it appearing that, in finding appellant guilty of murder, the jury may have relied upon the aiding and abetting instruction which included the ... language this court held to be unconstitutional in *Wilson-Bey* ..., and it further appearing that while trial counsel objected to the instruction as improperly eliminating the essential element of *mens rea*, appellate counsel did not raise the *Wilson-Bey* issue on direct appeal, it is ordered ... that [the government] shall ... file a response to the motion to recall the mandate addressing the issues raised in appellant's motion, including whether appellant's counsel on appeal rendered deficient performance in failing to challenge the constitutionality of the aiding and abetting instruction, and if so whether there is a reasonable likelihood that this court would have granted appellant a new trial.

App.75a-76a. The court also ordered "that the motion to recall the mandate is held in abeyance until further order of the court." App.76a.

After receiving the government's response brief, the D.C. Court of Appeals ordered "that the motion to recall [the] mandate is denied." App.77a. The court explained:

[B]ased upon the entire record, any error was harmless due to the overwhelming evidence presented at trial and the government's theory

that appellant was the sole shooter. Therefore, appellant has not met the high standard necessary to recall the mandate.

App.77a-78a.

Finally, Blount filed the current *pro se* habeas petition on September 18, 2013. The district court dismissed the petition as untimely under the one-year limitations period imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2244(d)(1). App.5a. The court also denied Blount's motion for reconsideration and his motion for a COA. *Id.*

B. The Decision Below

Blount timely appealed the dismissal and sought a COA from the United States Court of Appeals for the District of Columbia Circuit. A motions panel referred his COA motion to the merits panel and appointed Amicus. App.54a-55a. The merits panel then received full briefing from the parties and Amicus, heard oral argument by Amicus and the government, and denied the COA. App.20a.

Although Blount's habeas petition appeared to be untimely, App.7a-8a, he and Amicus argued that it was indeed timely for two separate and independent reasons. First, under *Jimenez v. Quarterman*, the D.C. Court of Appeals had reset the limitations clock when it reopened direct review in the course of evaluating the recall motion; the new clock did not begin to run until after that court's October 2012 denial of the recall motion, less than one year before this habeas petition was filed. *See* 555 U.S. 113, 119 (2009); App.8a-9a. Under D.C. procedure, if the recall motion has "on [its] face sufficient merit," *Watson*, 536 A.2d at 1060, the court

“recall[s] the mandate and reopen[s] the movant’s appeal in order to fully explore and then decide whether there was ineffective assistance of counsel on the first appeal,” *Long v. United States*, 83 A.3d 369, 378 (D.C. 2013) (quotation marks omitted). Blount and Amicus argued that, although the D.C. Court of Appeals had formally denied Blount’s recall motion, its orders revealed that “functionally” it had reopened the direct appeal. App.13a. The court below, however, refused to take a functional approach and declared simply that the D.C. Court of Appeals had not reopened the direct appeal because it “expressly ‘ordered that the motion to recall mandate be denied.’” App.14a. (quoting D.C. Ct. App. order).

Second, Amicus argued that Blount was “entitled to equitable tolling that would make his habeas petition timely.” App.15a. Amicus presented two theories of equitable tolling. One theory was based on the district court’s erroneous dismissal of Blount’s first habeas petition for failure to exhaust. Under *Rhines v. Weber*, the district court should have held that petition in abeyance while Blount exhausted. 544 U.S. 269, 278 (2005). This erroneous dismissal was an “extraordinary circumstance [that] stood in [Blount’s] way” because it unnecessarily jeopardized the timeliness of his potentially meritorious IAAC claim. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Thus, because Blount had “pursu[ed] his rights diligently” by promptly exhausting upon that dismissal and then returning to federal court via the current habeas petition, he was entitled to equitable tolling until that return. *Id.*; see App.30a-32a (dissent); see also, e.g., *Urcinoli v. Cathel*, 546 F.3d 269, 274-276 (3d Cir. 2008); *Jefferson v. Budge*, 419 F.3d 1013, 1016-1017 (9th Cir. 2005).

The other theory was that Blount's first habeas petition was a "defective pleading" entitling him to equitable tolling during its pendency. *Young v. United States*, 535 U.S. 43, 50 (2002) (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)). That period of equitable tolling was sufficient to render this habeas petition timely when combined with various periods of statutory tolling to which Blount was entitled. App.15a.

The court below recognized that both theories worked only if Blount's first habeas petition was itself timely. The government affirmatively conceded that it was timely, App.17a, but Amicus candidly advised the Court that the government's position appeared to rest on factual and legal errors. The government believed that Blount's §23-110 motion statutorily tolled the limitations period (*see* 28 U.S.C. §2244(d)(2)) between its apparent filing on June 6, 2005, and this Court's denial on October 4, 2010, of Blount's ensuing certiorari petition to review the denial of that motion. App.16a-17a. Amicus explained, however, that neither of those dates was correct. Blount actually filed his §23-110 motion later (November 16, 2005), and the resulting statutory tolling actually ended earlier (December 2, 2009, when the D.C. Court of Appeals' mandate issued). *Id.* Using the correct dates, Blount's first habeas petition was untimely.

Amicus nevertheless argued that the equitable-tolling theories were viable because of the government's concessions. Amicus pointed out that until that point, the government had repeatedly, in the district court and the court of appeals, used the wrong dates for the filing of the §23-110 motion and the expiration of the resulting statutory tolling. C.A. JA169, JA180. Indeed, as noted, the government had even affirmatively

told the court of appeals that the first habeas petition was timely. The district court had also consistently used the incorrect dates. App.39a, 44a-45a. On top of that, after Amicus pointed out the errors and argued that the government was bound by them, the government “failed to respond to *amicus*’s waiver argument.” App.17a.

The court of appeals, however, declared that it would “use the correct dates, despite the government’s repeated failure to argue for them.” App.17a. The court explained that to do otherwise “would be to decide the case on facts and law that all know to be false.” App.18a. Further, the court said that there was “no justification” to find a waiver or forfeiture because “Blount himself introduced the error” regarding the filing date of the §23-110 motion and the government had consistently maintained that the current habeas petition was untimely. *Id.*

Based on its reasoning, the court concluded that “jurists of reason would not find debatable the district court’s procedural holding that Blount’s petition was time-barred,” and accordingly denied the COA. App.20a.

Judge Williams dissented, charging that the majority had “perform[ed] a full-blown merits review on the timeliness of Blount’s petition—exhausting legal and factual arguments, crafting a new rule for interpreting state law, and invoking the court’s rarely-used discretion to forgive the government its concessions”—something this Court had held “inappropriate at the COA stage” just a few months earlier in *Buck v. Davis*, 137 S. Ct. 759 (2017). App.21a (dissent). Further, in Judge Williams’s view, Blount’s timeliness arguments were not merely debatable, App.21a-28a; they were

correct, App.30a-37a. Judge Williams also concluded that Blount's IAAC claim was at least "debatable amongst jurists of reason." App.28a-29a (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003)). Consequently, he concluded, the COA should have been granted. App.30a.

On November 14, 2017, the court of appeals denied Blount's petition for rehearing and rehearing en banc. App.56a-59a. On January 11, 2018, Blount filed his certiorari petition, which was docketed on March 6, 2018.

REASONS FOR GRANTING THE PETITION

I. THE COURT ERRONEOUSLY REFUSED TO ASSESS WHETHER THE D.C. COURT OF APPEALS HAD FUNCTIONALLY REOPENED DIRECT APPEAL FOR PURPOSES OF COMPUTING THE HABEAS LIMITATIONS PERIOD

The Court should grant the petition to clarify what its precedent already indicates: federal habeas courts should take a functional approach in assessing whether a state court reopened a petitioner's direct appeal for purposes of applying AEDPA's limitations provision. Had the court of appeals done so here, it would have found that the D.C. Court of Appeals reopened Blount's direct appeal and thus restarted the limitations clock less than one year before Blount filed the current habeas petition.⁴

A. In *Jimenez v. Quarterman*, this Court held that AEDPA's one-year limitations period is "reset" "where a state court ... in fact reopen[s] direct review" of the conviction; in such a case, the limitations period

⁴ It is undisputed that if the disposition of the recall motion restarted the clock under *Jimenez*, the current habeas petition is timely.

begins anew upon the conclusion of the reopened appeal or the expiration of the time for seeking review of the reopened appeal. 555 U.S. 113, 120-121 & n.4 (2009); see 28 U.S.C. §2244(d)(1)(A). That is because regardless of whether the reopened direct appeal is ultimately successful, its reopening makes the “conviction ... again capable of modification.” 555 U.S. at 120. And in the District of Columbia, recalling the mandate “reopens the movant’s appeal,” *Long v. United States*, 83 A.3d 369, 378 (D.C. 2013) (quotation marks omitted), satisfying *Jimenez*’s test for restarting the limitations clock.

The court below, however, concluded that because the D.C. Court of Appeals “never recalled the mandate,” it necessarily “did not reopen Blount’s direct appeal.” App.14a. But the question under *Jimenez* is not whether the D.C. Court of Appeals recalled the mandate; it is whether that court *reopened* the direct appeal. That recalling the mandate is sufficient to reopen the appeal does not mean it is also necessary to do so. Rather, as Judge Williams explained, this Court has instructed federal habeas courts to take a functional approach to determining whether direct appeal was reopened, and thus it is possible for the D.C. Court of Appeals to have reopened the appeal without recalling the mandate. App.34a-35a. The court’s formalistic approach—considering only whether the state court said it was reopening the appeal by recalling the mandate—contravened this Court’s decisions.

In *Jimenez* itself, this Court indicated that a functional approach should be used when it declared that the limitations period resets if the state court “*in fact* reopen[s] direct review.” 555 U.S. at 120-121 & n.4 (emphasis added). Taking a functional approach in this context follows from this Court’s general approach to habeas (and more broadly, to the intersection of federal

statutes and state procedures). In *Carey v. Saffold*, the Court confronted the question of how to apply AED-PA's tolling provision—which excludes the “time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending,” 28 U.S.C. §2244(d)(2)—to California's “unique state collateral review system.” 536 U.S. 214, 217 (2002). The word “pending,” the Court said, “cover[s] the time between a lower state court's decision and the filing of a notice of appeal to a higher state court.” *Id.* at 217, 219-221. California's system “does not involve a notice of appeal, but rather the filing (within a reasonable time) of a further original state habeas petition in a higher court.” *Id.* at 217. The Court did not get trapped in formalities, declaring that “for purposes of applying a federal statute that interacts with state procedural rules, we look to how a state procedure functions, rather than the particular name that it bears.” *Id.* at 223. The Court observed that in practice, prisoners in California “can obtain ... basic appellate review” through “an ‘original petition’ filed in a higher court.” *Id.* at 221-222. Thus, the Court found that “California's system functions in ways sufficiently like other state systems of collateral review to bring intervals between a lower court decision and a filing of a new petition in a higher court within the scope of the statutory word ‘pending.’” *Id.* at 223.

B. A functional analysis shows that the D.C. Court of Appeals actually reopened Blount's direct appeal notwithstanding its denial of the recall motion, thereby resetting the limitations clock under *Jimenez*.

Under D.C. law, a recall motion calls only for a *prima facie* evaluation of the claim: the motion should be granted if it has “*on [its] face* sufficient merit.”

Watson v. United States, 536 A.2d 1056, 1060 (D.C. 1987) (en banc) (emphasis added). The moving party makes a prima facie case not by relying on "conclusory assertions," but by pointing to specific authority ("giv[ing] 'chapter and verse'") and adducing "factual support." *Id.* In contrast, in the reopened appeal the court "fully explore[s] and then decide[s]" the IAAC claim. *Long*, 83 A.3d at 378 (quotation marks omitted).

Blount's recall motion plainly met the recall standard, for many reasons.

First, it raised a potentially meritorious IAAC claim, *infra* Part III.B, supported by specific legal authority and factual evidence, *see* C.A. JA145-151.

Second, the D.C. Court of Appeals stated that, "[o]n consideration" of the motion, "it appear[ed] that ... the jury may have relied upon" the unconstitutional accomplice instruction and that Blount's appellate counsel had failed to challenge that instruction even though his trial counsel had objected to it. App.75a. That was an explicit acknowledgment that Blount's claim had "on its face sufficient merit." *Watson*, 536 A.2d at 1060.

Third, and relatedly, the court directed the government to address the ultimate merits of the IAAC claim: "whether [Blount's] counsel on appeal rendered deficient performance in failing to challenge the constitutionality of the aiding and abetting instruction, and if so whether there is a reasonable likelihood that this court would have granted [Blount] a new trial." App.76a. That is the precise inquiry that the court would undertake after reopening the appeal. *Long*, 83 A.3d at 378. Concurrently, the court ordered that the recall motion be "held in abeyance until further order of the court," App.76a—an action that was unnecessary if

the court viewed itself as simply resolving the recall motion rather than attending to another matter, namely, the underlying merits.

Finally, after receiving the government's briefing, the court ruled that, "based upon the entire record, any error was harmless." App.77a-78a. Reaching a conclusion about the ultimate merits of a claim after reviewing "the entire record"—rather than simply concluding that the claim lacked facial merit—is indistinguishable from the "deci[sion]" that the D.C. Court of Appeals would render after conducting a "full[] explor[ation]" in a reopened appeal. *Long*, 83 A.3d at 378.

The D.C. Court of Appeals, indeed, has acknowledged that, although its usual process is to "first" grant the recall motion and "later" decide "the merits of the re-opened appeal," it will sometimes resolve the ultimate merits of an IAAC claim concurrently with its disposition of a recall motion. *Long*, 83 A.3d at 378 n.15. In *Long*, the court approved a "streamlined approach," whereby the court "expedite[s] matters by combining [its] discussion of the [recall] motion's merit with the resolution of appellant's [IAAC] claim." *Id.* at 378 & n.15. True, in *Long* the court expressly granted the recall motion before ruling for the defendant on the IAAC claim. See App.11a. But where the court decides that the IAAC claim ultimately fails, it understandably may find it administratively convenient to express that conclusion through a denial of the recall motion. A federal habeas court should accommodate such practicalities.

As Judge Williams pointed out, App.34a, the panel majority's "struggle to understand" how the D.C. Court of Appeals could have *said* it was denying the recall motion but *actually* resolved the ultimate merits of the IAAC claim, App.14a, is puzzling in light of this Court's

decision in *Buck*. There, this Court found that the Fifth Circuit did in the COA context precisely what Blount contends the D.C. Court of Appeals did on his recall motion: "The court below phrased its [COA] determination in proper terms—that jurists of reason would not debate that Buck should be denied relief—but it reached that conclusion only after essentially deciding the case on the merits." 137 S. Ct. at 773 (citation omitted). For example, this Court noted, the Fifth Circuit had repeatedly said that Buck had "not shown extraordinary circumstances that would permit relief" under Rule 60. *Id.* at 773 (quoting decision under review). Such declarations reflected the appellate court's "ultimate merits determinations," *id.* at 774, much like the D.C. Court of Appeals' declaration that, "based upon the entire record, any error was harmless," App.77a-78a. Perhaps, though, the difficulty the court below had grasping the possibility that an appellate court might say it is deciding only a threshold question but actually decide the ultimate question explains why (as discussed below) the majority committed the same error that the Fifth Circuit committed in *Buck*.

Finally, the court below attacked a strawman when it concluded that if Blount were right about the reopening, "that would mean that any habeas petitioner could unilaterally reopen direct review and restart his limitations clock simply by filing a frivolous motion to recall the mandate." App.13a. The deficiency of a frivolous claim is apparent on its face. But as explained later, Blount's IAAC claim was facially legitimate, *infra* Part III.B, hence the D.C. Court of Appeals went deeper to resolve the ultimate merits.

II. THE COURT CONTRADICTED THIS COURT'S CLEAR PRECEDENT IN RELIEVING THE GOVERNMENT OF ITS MISTAKEN CONCESSION WHERE THE GOVERNMENT HAD NOT REQUESTED SUCH RELIEF AND THE COURT DID NOT DETERMINE THAT EXTRAORDINARY CIRCUMSTANCES WARRANTED SUCH RELIEF

The refusal of the court below to hold the government to its concessions about the timeliness of Blount's first habeas petition (including its concessions regarding the period during which Blount's §23-110 motion tolled the limitations period) contravenes this Court's precedent—so clearly that summary reversal is appropriate.

A. "Ordinarily," a defendant "forfeit[s]" a defense by not timely raising it. *Wood v. Milyard*, 566 U.S. 463, 470 (2012) (quotation marks omitted). "A court is not at liberty ... to bypass, override, or excuse a State's deliberate waiver"—its "knowing[] and intelligent[] relinquish[ment]"—"of a limitations defense." *Id.* at 466, 470 n.4, 472-473. Where the State's failure to raise a limitations defense "stem[s] from an inadvertent error," however, "a court of appeals has discretion to address [it], *sua sponte*"—but *only* "in exceptional cases." *Id.* at 473-474; *see also id.* at 471 ("federal appellate courts have discretion, in exceptional cases, to consider a [timeliness] argument inadvertently overlooked by the State in the District Court") (quotation marks and alterations omitted).

As Judge Williams observed, the panel majority failed to apply these rules. App.25a-27a. Even if the government's concessions here reflect inadvertent error rather than deliberate waiver (a point the government has never asserted), the court below was empowered to ignore the concessions only if the government

asked for that or it found the existence of extraordinary circumstances. Here, the government never argued that it should be relieved of its concessions, and the court never inquired into any extraordinary circumstances. Instead, the court found “no justification” for “decid[ing] the case on facts and law that all know to be false,” App.18a, thus inverting the presumption in favor of forfeiture recognized in *Wood*.

B. Had the court adhered to the correct standard, it could not have found the requisite extraordinary circumstances. “[T]he interests of justice would be better served by addressing the merits” of Blount’s IAAC claim, *Day v. McDonough*, 547 U.S. 198, 210 (2006) (quotation marks omitted), because the claim plainly is potentially meritorious, *infra* Part III.B. And when Amicus pointed out the government’s errors and argued that the government had waived or forfeited any untimeliness defense based on the correct dates, the government “failed to respond to *amicus*’s waiver [or forfeiture] argument.” App.17a. Even if that silence does not amount to a waiver, it at least reveals that even the government did not believe it should be relieved of its errors. Finally, extensive substantive litigation occurred based on the incorrect dates: in the district court, on the motions to dismiss, for reconsideration, and for a COA; and in the court of appeals, on the motion for a COA. *See id.*⁵

⁵ These circumstances are quite different from those in *Day*, where this Court held that the district court “had discretion to correct the State’s error” in calculating the “tolling time” of a habeas petition—there was no suggestion that Day’s habeas petition was potentially meritorious, the state had not passed on an opportunity to explain why it should not be bound by its mistake, and the state had not repeatedly stated its incorrect calculation in both the district court and the court of appeals. 547 U.S. at 201-202.

In sum, as Judge Williams explained, the majority “chose[] to respond to the government’s errors with easy magnanimity, and to Blount’s diligence with merciless exactitude. This approach is particularly troubling given the strength of Blount’s underlying [IAAC] argument.” App.27a.⁶

III. THE COURT FURTHER CONTRADICTED THIS COURT’S CLEAR PRECEDENT BY DENYING THE COA BASED ON ITS RESOLUTION OF THE ULTIMATE MERITS OF THE APPEAL

Even if the arguments above regarding the petition’s timeliness are not, at this point, conclusive, they are enough to entitle Blount to a COA. The contrary conclusion of the majority below is so inconsistent with this Court’s clear precedent that, again, summary reversal is warranted.

A. “At the COA stage,” this Court has explained, the only question is whether the applicant has shown that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims.

Buck, 137 S. Ct. at 773 (quotation marks and citation omitted).

⁶ The court below blamed Blount for initially “introduc[ing]” the erroneous date for the filing of the §23-110 motion. App.18a. That is irrelevant. The government had the professional training and ample opportunity to identify and correct the error yet “repeated[ly] fail[ed]” to do so. App.17a.

Just a few months before the court below issued its decision, this Court rebuked the Fifth Circuit for “phras[ing] its [COA] determination in proper terms—that jurists of reason would not debate that Buck should be denied relief—but ... reach[ing] that conclusion only after essentially deciding the case on the merits.” *Buck*, 137 S. Ct. at 773 (citation omitted). That the Fifth Circuit had improperly resolved the underlying merits was revealed in its conclusive statement that the habeas petitioner had “not shown [the necessary] extraordinary circumstances.” *Id.* at 773-774 (quoting decision under review).

Here, the court below committed the same error. Although the court sometimes couched its conclusions in terms of debatability, *see, e.g.*, App.19a (“The thread by which those theories hang ... is too thin to make the issue debatable.”), it actually performed a full examination of the facts and law on the dispositive issues—whether the D.C. Court of Appeals had reopened the direct appeal and whether the government’s concession should be disregarded—diligently marching through arguments and counterarguments, *see* App.8a-19a; *cf.* App.19a n.6 (denying that the court was performing full examination because it “refrained from reaching” other issues). The court also reached conclusive assessments of the ultimate merits on those issues: “In short, the D.C. Court of Appeals *did not reopen* Blount’s direct appeal ...,” App.14a (emphasis added); “Even if a party’s waiver or forfeiture could ever lead a reasonable jurist to accept such an erroneous premise, *there is no justification* for doing so here,” App.18a (emphasis added).

The circumstances here show even more clearly than in *Buck* that the court improperly denied the COA based on its assessment of the ultimate merits. As dis-

cussed above, the dispositive issues were at least debatable. *See* App.27a-28a (dissent). The motions panel referred Blount's case to a merits panel; surely it would not have done so just to waste the merits panel's time on an appeal that no reasonable jurist could find debatable. And a circuit judge dissented in Blount's favor, also "indicat[ing] that reasonable minds could differ" and thus the COA should have issued, *Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., dissenting from denial of writ of certiorari, joined by Ginsburg and Kagan, JJ.); 28 U.S.C. §2253 (single circuit judge may issue COA)—especially because Judge Williams not only found Blount's timeliness and IAAC arguments debatable but also found Blount's timeliness arguments *meritorious*.

B. Under the correct standard, the COA should be granted. Not only is the habeas petition's timeliness at least debatable, as discussed, but so is the substance of Blount's IAAC claim, as Judge Williams recognized, App.28a-29a. Because Blount had specifically directed his appellate counsel to raise the accomplice-instruction objection and because the objection was preserved and clearly stronger than other objections raised, *supra* pp.5-6, Blount's direct-appeal counsel's failure to raise it was professionally deficient. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Lynch v. Dolce*, 789 F.3d 303, 312-316 (2d Cir. 2015); *Long*, 83 A.3d at 375; *see also* Amicus C.A. Br. 47-49.⁷ And there is "a reasonable probability that [on direct appeal, the D.C. Court of Appeals] would have rejected the government's claim of harmlessness beyond a reasonable doubt." App.29a

⁷ The deficiency "element" of Blount's IAAC claim is evaluated "*de novo*" because the D.C. Court of Appeals "did not decide" it. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam).

(dissent).⁸ The government, the trial judge, and the D.C. Court of Appeals all acknowledged that reasonable jurors could have found that Blount was not the principal, *see supra* pp.4-5, and the government has never argued that there was sufficient evidence to meet the accomplice-liability standard required by *Wilson-Bey*. *See* Amicus C.A. Br. 52-54.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should consider summary reversal on Questions Two and Three.

Respectfully submitted.

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⁸ The prejudice element of Blount's IAAC claim is evaluated *de novo* because the D.C. Court of Appeals applied the wrong standard. App.29a (dissent); Amicus C.A. Br. 50-52; Amicus C.A. Reply 23-27; *see Panetti v. Quarterman*, 551 U.S. 930, 953-954 (2007); *Williams v. Taylor*, 529 U.S. 362, 391-399, 405-406, 413 (2000).

APPENDICES

1a

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 15-5056

CARLTON J. BLOUNT,

Appellant,

v.

UNITED STATES OF AMERICA
AND DISTRICT OF COLUMBIA,

Appellees.

Argued November 17, 2016
Decided June 27, 2017

OPINION

Before: HENDERSON and GRIFFITH, Circuit
Judges, and WILLIAMS, Senior Circuit Judge.

Dissenting opinion filed by Senior Circuit Judge
WILLIAMS.

GRIFFITH, Circuit Judge:

Carlton Blount is a prisoner convicted of two murders who filed a habeas petition under 28 U.S.C. § 2254. The district court dismissed the petition as time-barred, a decision that Blount now seeks to appeal. But the federal habeas statute restricts such appeals. Blount's "appeal may not be taken to the court of appeals" unless he obtains a certificate of appealability (COA). 28 U.S.C. § 2253(c)(1). To do so, Blount must make a sufficient initial showing to a judge or circuit justice. *Id.* § 2253(c)(1)-(2). Blount requests a COA

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from us, but because he has not made the necessary showing, we must deny his request.

I

On the night of February 8, 2000, Carlton Blount and two friends attended a basketball game at Blount's former high school. There, Blount and one of his friends got into a fight with a student at the school, Andre Wallace. After onlookers broke up the fight, Blount and his friends left the school and went looking for Wallace. They eventually drove to the home of Wallace's girlfriend, Natasha Marsh, and the couple arrived shortly afterwards. An argument erupted, gunshots ensued, and Wallace and Marsh were killed.

Blount was charged in D.C. Superior Court with several counts, including the murders of Wallace and Marsh. At trial, the government's primary theory was that Blount alone shot the victims. Blount's defense was that one of his friends pulled the trigger. The judge instructed the jury that even if a friend was the shooter, Blount could be convicted under the doctrine of accomplice liability. The judge's instructions included the following statements:

It is not necessary that [Blount] have had the same intent that [the] principal offender had when the crime was committed, or that he had intended to commit the particular crime committed by the principal offender.

An aider and abetter is legally responsible for the acts of other persons that are the natural and probable consequences of the crime in which he intentionally participates.

J.A. 121-22. The defense objected that making Blount responsible for the "natural and probable consequences

of the crime” allowed him to be convicted even if he lacked the necessary *mens rea*. Under the judge’s instruction, an accomplice could be convicted of first-degree murder without proof that he acted with premeditation and deliberation. That, the defense argued, eliminated the *mens rea* element of the offense, violating the Sixth Amendment’s guarantee of a jury verdict on every element. The judge overruled the objection, and in February 2001, the jury convicted Blount of first-degree murder of Marsh, second-degree murder of Wallace, and several related counts. Blount was sentenced to prison for sixty-four years to life.

On appeal, Blount was represented by new counsel, who failed to renew the constitutional challenge to the jury instruction. The D.C. Court of Appeals affirmed Blount’s convictions and sentence. It denied his motion for rehearing on October 13, 2004, and formally ended the appeal by issuing a mandate on October 21, 2004. Blount did not petition the U.S. Supreme Court for review.

About two years later, in an unrelated case, the D.C. Court of Appeals held unconstitutional the same jury instruction used in Blount’s case, on the very grounds that Blount had raised at trial. See *Wilson-Bey v. United States*, 903 A.2d 818, 826, 829-44 (D.C. 2006) (en banc). But because Blount’s conviction had already been affirmed on direct review, the decision had no immediate effect on him.

Meanwhile, Blount had begun a series of unsuccessful *pro se* collateral challenges to his conviction. On November 16, 2005—over a year after the D.C. Court of Appeals denied his motion for rehearing, the last decision in his direct appeal—Blount signed and mailed from prison to the court a motion for collateral review

under D.C. Code § 23-110.¹ The motion included a challenge to the accomplice-liability instruction, but the trial court held the claim procedurally defaulted because Blount had failed to raise it on direct appeal. The court denied Blount's motion and the D.C. Court of Appeals affirmed, issuing its mandate on December 2, 2009.

Blount's next collateral challenge was a federal habeas petition, which he signed on March 17, 2011.² Among other arguments, Blount claimed for the first time that he received ineffective assistance of appellate counsel (IAAC) during his direct appeal because his appellate lawyer had failed to challenge the constitutionality of the now discredited jury instruction. The district court dismissed the petition, holding that Blount had not yet exhausted his local remedies on the IAAC claim, and that the court lacked jurisdiction over his other claims. *Blount v. Wilson*, No. 11-0743, 2011 WL 1526945 (D.D.C. Apr. 19, 2011). Both the district court and this court denied Blount's request for a COA. *Blount v. Wilson*, No. 11-7060 (D.C. Cir. Sept. 27, 2011).

Blount then returned to the D.C. Court of Appeals to raise his IAAC claim through the proper local mechanism: a motion to recall the mandate that the court had issued in his direct appeal. See *Watson v. United States*, 536 A.2d 1056, 1060 (D.C. 1987) (en banc) (establishing the motion to recall the mandate as the D.C. procedure for raising an IAAC claim). Although Blount's motion, filed by mail on October 28, 2011, was

¹ There is some dispute as to whether another date—other than the one on which Blount signed and mailed his motion—should be considered the filing date when calculating the limitations period here. We discuss this issue below in section II.B.ii.

² The filing date of this petition is also in dispute, as discussed in section II.B.ii.

untimely, the D.C. Court of Appeals excused that flaw and ordered the government to respond on the merits. The court ultimately denied Blount's motion in late 2012, holding that "based upon the entire record, any error was harmless," and therefore Blount had "not met the high standard necessary to recall the mandate." *Blount v. United States*, No. 01-CF-974, at 1 (D.C. Oct. 11, 2012).

Around the same time as Blount made that motion to recall the mandate, he filed a second motion for collateral review under D.C. Code § 23-110, raising claims not directly at issue here. The trial court denied the motion and the D.C. Court of Appeals affirmed in May 2013.

Which brings us to Blount's present federal habeas petition, filed under 28 U.S.C. § 2254 on September 18, 2013. The rules for habeas petitions challenging state-court judgments govern Blount's habeas petition, because the federal habeas statute "recognizes that 'a court of the District [of Columbia] is a state court.'" *Head v. Wilson*, 792 F.3d 102, 106 n.3 (D.C. Cir. 2015) (quoting *Madley v. U.S. Parole Comm'n*, 278 F.3d 1306, 1308 (D.C. Cir. 2002)). The district court granted the government's motion to dismiss, holding in relevant part that Blount's habeas petition was filed outside the one-year limitations period imposed by 28 U.S.C. § 2244(d)(1), enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217. Blount filed a motion for reconsideration under Federal Rule of Civil Procedure 59(e), which the district court denied, holding again that his petition was time-barred.

Blount timely filed a notice of appeal but failed to obtain a COA from the district court. He now requests

one from us. We have jurisdiction over that request under 28 U.S.C. § 2253(c), and we appointed *amicus curiae* to argue in support of Blount.

II

The procedural history of this case is knotted, and the creative theories raised in Blount's favor only compound that complexity. But the case is complicated, not close. When the knots are untangled and the arguments unpacked, there is no reasonable dispute: Blount's habeas petition was untimely. The answer is thus clear even under the "limited" inquiry we conduct when considering a request for a COA. *Buck v. Davis*, ___ U.S. ___, 137 S.Ct. 759, 774, 197 L.Ed.2d 1 (2017).

To obtain a COA, the applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" is a demonstration "that reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)). Where, as here, "the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the successful COA applicant must show us that "jurists of reason would find ... debatable" not only "whether the petition states a valid claim of the denial of a constitutional right," but also "whether the district court was correct in its procedural ruling." *Id.* at 478, 120 S.Ct. 1595.

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“Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” *Id.* at 484, 120 S.Ct. 1595. Because Blount’s petition was plainly time-barred and no jurist of reason could take issue with that procedural ruling by the district court, we deny his request for a COA without having to reach his constitutional claim.³

A

Blount’s habeas petition is subject to a one-year limitations period. *See* 28 U.S.C. § 2244(d)(1). All agree that Blount’s one-year clock runs from the date when his judgment of conviction “became final by the conclusion of direct review or the expiration of time for seeking such review.” *Id.* § 2244(d)(1)(A). Statutory tolling pauses the clock while “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” *Id.* § 2244(d)(2). In some circumstances, equitable tolling can also apply. *See Holland v. Florida*, 560 U.S. 631, 634, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010).

Blount’s limitations period began to run on January 11, 2005, when time expired for seeking Supreme Court

³ Because we deny the COA on those grounds, we also decline to address either the district court’s alternative procedural holding that D.C. Code § 23-110 barred Blount’s IAAC claim or the propriety of Blount’s naming the “United States of America (District of Columbia)” as respondent and filing his petition in the U.S. District Court for the District Court of Columbia. IAAC claim or the propriety of Blount’s naming the “United States of America (District of Columbia)” as respondent and filing his petition in the U.S. District Court for the District of Columbia.

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review in the direct appeal of his conviction. *See* J.A. 203 (showing that the D.C. Court of Appeals denied rehearing on October 13, 2004); SUP. CT. R. 13 (providing that the time for petitioning for a writ of certiorari expires ninety days after the denial of rehearing). Three hundred nine days of the one-year limitations period then elapsed before Blount filed a local post-conviction motion under D.C. Code § 23-110 on November 16, 2005, starting statutory tolling. That tolling ended on December 2, 2009, when the D.C. Court of Appeals issued its mandate in the section 23-110 proceedings, *cf. Holland*, 560 U.S. at 638, 130 S.Ct. 2549 (ending statutory tolling when mandate issued), and the limitations period's remaining 56 days expired on January 27, 2010. Blount filed his present habeas petition in 2013: over three years later, and thus considerably out of time.

B

The recounting of that timeline provides enough analysis to end the case. Blount and *amicus* raise several alternative theories in an effort to argue that it is at least debatable that his habeas petition was timely. None succeeds.

I

Principally, Blount and *amicus* contend that the D.C. Court of Appeals reopened direct review in 2012, thereby restarting the entire one-year limitations period for Blount's habeas petition that expired in 2010. Under *Jimenez v. Quarterman*, 555 U.S. 113, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009), a "conviction [is] no longer final for purposes of § 2244(d)(1)(A)" when a court "reopen[s] direct review of [the] conviction." *Id.* at 120, 129 S.Ct. 681. In that event, the AED- PA limitations clock starts anew when the reopened appeal reaches a

final judgment. *See id.* According to Blount and *amicus*, the D.C. Court of Appeals reopened direct review in Blount's case in evaluating his motion to recall the direct-appeal mandate, which Blount made to exhaust his local remedies on his IAAC claim.

That theory fails, however, for the simple reason that the D.C. Court of Appeals never granted Blount's motion to recall the mandate. There is no reasonable debate over whether the motion was granted: the court "ordered that the motion to recall mandate [be] denied." *Blount v. United States*, No. 01-CF-974, at 1 (D.C. Oct. 11, 2012) (capitalization altered). And there is no reasonable debate over whether this disposition reopened the appeal: the D.C. Court of Appeals has never held that denying a motion to recall the mandate reopens an appeal.

To fully explain these issues requires a bit more discussion. When a movant raises an IAAC claim through a motion to recall the mandate, the D.C. Court of Appeals first determines whether the motion has "on [its] face sufficient merit" to justify disturbing the judgment. *Watson v. United States*, 536 A.2d 1056, 1060 (D.C. 1987) (en banc). If so, the court will then "recall[] the mandate and reopen[] the movant's appeal in order to fully explore and then decide whether there was ineffective assistance of counsel on the first appeal." *Id.* at 1061. By reopening the direct appeal, a recall of the mandate resets the filing deadline for a federal habeas petition, regardless of whether the reopened appeal is ultimately resolved in the appellant's favor. But critically, the appeal is not reopened until the motion to recall the mandate is *granted*. *Id.*; *see also id.* ("A motions panel granted the request [to recall the mandate], vacated our original judgment, and *thereby* revitalized [the] direct appeal." (emphasis add-

ed)); *Head v. United States*, 626 A.2d 1382, 1384 (D.C. 1993) (“[B]y granting the motion to recall the mandate, the direct appeal is revived”). This requirement ensures that “judgments will not be disturbed” except “in the presence of exceptional circumstances.” *Watson*, 536 A.2d at 1060. In Blount’s case, the D.C. Court of Appeals “ordered that the motion to recall mandate [be] denied,” *Blount*, No. 01-CF-974, at 1 (capitalization altered) (emphasis added), which left the original mandate intact, the direct appeal closed, and the habeas filing deadline untouched.

Blount and *amicus* try several paths around this obstacle, but each finds a dead end. To begin with, they argue that the D.C. Court of Appeals followed an unconventional procedure in which the court simultaneously denied Blount’s motion to recall the mandate, and reopened and rejected his direct appeal. The D.C. Court of Appeals followed a similar procedure in *Long v. United States*, 83 A.3d 369 (D.C. 2013). There, the court granted a motion to recall the mandate raising an IAAC claim and, in the same opinion, resolved the direct appeal by vacating the sentences at issue. *Id.* at 378, 384. The court explained that it was “combin[ing] those procedural steps”—that is, “resolution of the question of the motion’s merit and resolution of [the] appellant’s re-opened appeal”—because they “require[d] an examination of the same issues, so that a ruling on one [was] essentially a decision on the other.” *Id.* at 378 n.15. Blount and *amicus* argue that the D.C. Court of Appeals did the same in his case. In one fell swoop, they argue, the court resolved Blount’s motion to recall the mandate and his underlying IAAC claim. By reaching the latter, they argue, the court reopened direct review of Blount’s appeal.

First, this argument misreads *Long*. That case, where the court *granted the motion*, tells us nothing new about this case, where the court *denied the motion*. *Long*'s streamlined approach is perfectly consistent with the rule that a motion to recall the mandate reopens an appeal only when granted. In *Long*, the court first "*grant[ed]* appellant's motion to recall the mandate as sufficiently meritorious, and *after re-opening appellant's direct appeal*," then resolved the IAAC claim. *Id.* at 384 (emphases added). *Long*'s innovation was to take those two steps in a single opinion. As Blount and *amicus* would have it, however, *Long* also made the two steps equivalent: the court's decision on the motion to recall the mandate becomes the same as a decision on the merits of the IAAC claim in the reopened direct appeal. Not so. Recalling the mandate is antecedent, logically and procedurally, to resolving the direct appeal. Taking both steps in the same opinion made sense in *Long*, because recalling the mandate at the first step allowed it to reach the second step of resolving the appeal, and the court saw no need to wait for a second opinion to do so. When the court refuses to recall the mandate, however, it has no occasion to proceed to the reopened appeal. Put simply, in a single gesture the court can unlock the door and step into the room, but if it leaves the door shut, it can go no further.

Second, even if Blount and *amicus* were right that D.C. law somehow allows a court to resolve the underlying IAAC claim even when declining to recall the mandate, the D.C. Court of Appeals did not do that here. The court concluded only that Blount "ha[d] not met the high standard *necessary to recall the mandate*." *Blount*, No. 01-CF-974, at 1 (emphasis added). The court did not go beyond that threshold inquiry and take up whether Blount met the standard for vacating

his conviction on direct review. According to *amicus*, there are signs that the court did actually reach the underlying appeal: for instance, the court invoked the merits of Blount's IAAC claim, based its decision "upon the entire record," *id.*, and issued a separate order requesting a response from the government. But those signs do not contradict the court's declaration that it applied only the standard for recalling the mandate; instead, they are fully consistent with that disposition. The movant's "heavy initial burden" requires him to make "a persuasive case for recall of the mandate" by showing that the IAAC claim has "sufficient merit" to warrant reopening the appeal and giving the claim full consideration. *Watson*, 536 A.2d at 1060. To determine whether Blount's IAAC claim had sufficient merit, the court assessed it in light of the record and the government's arguments. Concluding that Blount failed to satisfy his initial burden, the court never moved beyond that threshold inquiry.

Having failed to show that the D.C. Court of Appeals recalled the mandate by using the procedure followed in *Long*, Blount and *amicus* take a different tack. They argue that the court's analysis in denying the motion to recall the mandate was so much like what the court would have done on direct review that the court effectively reopened direct review. In particular, they note that the court denied Blount's motion on the ground that his IAAC claim lacked merit, which is the same analysis the court would have conducted if reviewing a reopened direct appeal. With no direct support for this notion of functional equivalence, Blount and *amicus* extrapolate from the Supreme Court's statement in *Jimenez* that when a court reopens an appeal, the "conviction [is] again capable of modification through direct appeal to the state courts and to [the

Supreme Court] on certiorari review.” 555 U.S. at 120, 129 S.Ct. 681. Blount and *amicus* argue that the D.C. Court of Appeals functionally treated Blount’s conviction as “capable of modification” by assessing the merits of his IAAC claim.

We reject this argument, too. The D.C. Court of Appeals does not reopen a completed appeal simply because its reasoning in denying a motion to recall the mandate mirrors the reasoning it would use on a reopened appeal. That logic leads to incongruous results. Consider a hypothetical motion to recall the mandate raising a wholly frivolous IAAC claim. The court would deny the motion because the IAAC claim is frivolous. If the court were reviewing a reopened direct appeal with the same claim, the court would likewise conclude that the claim is frivolous. According to the argument advanced by Blount and *amicus*, because the court performed the same analysis when reviewing the motion to recall the mandate as it would have if reviewing a reopened direct appeal, resolving the motion reopened direct review. But that would mean that any habeas petitioner could unilaterally reopen direct review and restart his limitations clock simply by filing a frivolous motion to recall the mandate. That cannot be. Instead, the court must deliberately agree to reopen direct review. Here, the court refused to do so.

Jimenez does not suggest otherwise. The passage on which Blount and *amicus* rely simply describes what happens after a state court issues an “order ... ‘restor[ing] the pendency of the direct appeal.’” 555 U.S. at 120, 129 S.Ct. 681 (quoting *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997)). After such an order, the conviction becomes “again capable of modification through direct appeal to the state courts and to [the Supreme Court] on certiorari review.” *Id.* Here,

the D.C. Court of Appeals issued no order restoring the direct appeal. The order instead *denied* the motion to recall the direct-appeal mandate. Blount's conviction thus never became capable of modification "through direct appeal to" the D.C. courts or the U.S. Supreme Court. Those courts could hear no new direct appeal while the original direct-appeal mandate remained in effect.

In short, the D.C. Court of Appeals did not reopen Blount's direct appeal because the court never recalled the mandate.⁴ Our dissenting colleague would resolve the issue differently, but we share a key premise. He concludes that the D.C. Court of Appeals reopened Blount's appeal because its "disposition of Blount's motion comprised both a decision to recall and a decision on the merits." Dissenting Op. at 751. We agree that would be the disposition necessary to reopen the appeal. But we struggle to understand how the court could have "decide[d] to recall," *id.*, when it expressly "ordered that the motion to recall mandate [be] denied," *Blount*, No. 01-CF-974, at 1 (capitalization altered). Because we see no reasonable debate over whether the D.C. Court of Appeals denied Blount's bid

⁴ It may appear harsh at first glance not to adjust Blount's limitations clock after his motion to recall the mandate languished in the D.C. courts. But we expect (with no need to decide here) that statutory tolling would pause the clock during such proceedings, because a motion to recall the mandate raising an IAAC claim is a form of local "post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). Even if this were so, however, Blount would not benefit from statutory tolling because his time ran out before he filed his motion to recall the mandate. That is why he must take the more aggressive position that his motion restarted the clock altogether. As we have explained, that position is clearly incorrect.

to reopen his appeal, he is not entitled to a COA on this theory.

ii

In the alternative, Blount argued to the district court that he is entitled to equitable tolling that would make his habeas petition timely. Although he does not press that argument before us in his *pro se* briefs, court-appointed *amicus* does. *Cf. Bowie v. Maddox*, 642 F.3d 1122, 1135 n.6 (D.C. Cir. 2011) (“We have no qualms about addressing an argument raised by court-appointed *amicus curiae* and not by the *pro se* party on whose behalf he was appointed to present arguments.”). *Amicus*’s first theory of equitable tolling is that Blount’s first federal habeas petition should have been stayed and held in abeyance, an approach endorsed in *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). Under that theory, because the limitations clock would have stopped while the first petition was held in abeyance, equitable tolling would apply from the filing of Blount’s first petition until the filing of the present one. Second, *amicus* argues that Blount’s pursuit of judicial remedies through his first petition, although unsuccessful, warranted equitable tolling during the pendency of that petition. *Cf. Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (“We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period”).

But under either theory, equitable tolling begins only when Blount filed his first federal habeas petition. By then the limitations period had already expired. As explained above in section II.A, the limitations period expired on January 27, 2010, and Blount’s first federal

habeas petition was filed over a year later, in March 2011.⁵ Regardless of the legal merits of *amicus*'s theories, neither theory would start equitable tolling early enough to make Blount's petition timely.

Amicus's only response is that we should modify our calculation of the limitations period in two ways, both of which *amicus* concedes are actually incorrect. *Amicus* Br. 10 & n.3, 41-42. First, *amicus* wants us to use June 6, 2005 as the filing date for Blount's first motion under D.C. Code § 23-110, which starts statutory tolling. In the district court, the parties and the court assumed that was the proper filing date, but that was wrong twice over. For one, the date appears to be a typographical error meaning to refer to June 5, 2006, the date on which the D.C. Superior Court docketed the motion. *See* J.A. 190. For another, the docketing date is not the filing date. The motion was filed when Blount mailed the motion on November 16, 2005. *See* S.A. 69-70; *Houston v. Lack*, 487 U.S. 266, 276, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (holding that a prisoner files a document at the time he "deliver[s] it to the prison authorities for forwarding to the court clerk"). Next, *amicus* wants us to adopt a second error from the government's district-court briefing: using October 4, 2010, when the Supreme Court denied certiorari review of Blount's first section 23-110 motion, as the end date for

⁵ *Amicus* suggests that the filing date of the first petition is uncertain, but the uncertainty does not affect our analysis. Blount signed the petition on March 17, 2011, S.A. 7, so he presumably filed it on that date or later. But Blount claimed before the district court in present proceedings that he filed the petition in December 2010, and the government failed to object. *See* *Amicus* Br. 12 & n.4. Regardless of whether we consider the petition filed in December 2010 or March 2011, the filing date came long after the limitation period expired in January 2010.

statutory tolling. But Supreme Court review does not count towards statutory tolling, so the correct end date is December 2, 2009, when the D.C. Court of Appeals issued its mandate. See *Lawrence v. Florida*, 549 U.S. 327, 329, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) (holding that a petition for certiorari does not extend statutory tolling); *Holland*, 560 U.S. at 638, 130 S.Ct. 2549 (ending statutory tolling when mandate issued).

Only if we adopted both errors would Blount's first habeas petition appear timely, making *amicus's* equitable-tolling theories viable. *Amicus* argues that we should do so because the government waived any objection. As *amicus* observes, the government included both errors in its district-court briefing, mistakenly stated in its appellate briefing that Blount's first federal habeas petition was timely, and failed to respond to *amicus's* waiver argument.

We will use the correct dates, despite the government's repeated failure to argue for them. Cf. *Nattah v. Bush*, 605 F.3d 1052, 1058 (D.C. Cir. 2010) ("[W]e may affirm the district court's decision 'on the basis of any grounds which support it.' "(alterations omitted) (quoting *In re Swine Flu Immunization Prods. Liab. Litig.*, 880 F.2d 1439, 1444 (D.C. Cir. 1989))); cf. also *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991) ("When an issue or claim is properly before the court, the court ... retains the independent power to identify and apply the proper construction of governing law."). It is particularly clear that we have no basis to adopt the first error of using June 6, 2005 as the filing date for Blount's first D.C. Code § 23-110 motion. That date is not only wrong, but it is undisputedly and indisputably so. As explained above, it is an apparent typographical error without a scintilla of support in the record or the law. To treat

the section 23-110 motion as filed on June 6, 2005— and to treat Blount's first habeas petition as timely and his equitable tolling theories as viable—would be to decide the case on facts and law that all know to be false.

Even if a party's waiver or forfeiture could ever lead a reasonable jurist to accept such an erroneous premise, there is no justification for doing so here. Notwithstanding the government's mistake, Blount had ample notice of the issue and opportunity to argue the point. In fact, it was amicus—raising the equitable-tolling arguments in support of Blount—who candidly identified the date error. Even more significantly, Blount himself introduced the error. His habeas petition, the opening filing in the present litigation, averred that he filed his D.C. Code § 23-110 motion “[o]n June 6, 2005.” J.A. 6. That may well have been an honest mistake, but all the same, the government and district court used that date only after Blount did first. We see no reason why Blount should get the benefit of an error he introduced. Instead, under all these circumstances, we think it obvious that the correct date should apply.

Finally, AEPDA's waiver rules do not require otherwise. True, under AEDPA a court may not “bypass, override, or excuse [the government's] deliberate waiver of a limitations defense.” *Wood v. Milyard*, 566 U.S. 463, 132 S.Ct. 1826, 1830, 182 L.Ed.2d 733 (2012); *cf. also id.* at 1833-34 (explaining that a court may, however, excuse the unintentional forfeiture of a timeliness defense). But the government has not waived, forfeited, or conceded its defense that Blount's current petition is untimely. Far from it: the government raised that defense below, prevailed, and now argues for affirmance on that ground. The government merely failed to make a particular argument, based on the correct date calculation, in support of that defense. Nor

did the government waive its limitations defense against Blount's *first* habeas petition. To be sure, the government wrongly stated in the present proceedings that the first petition was timely. But that statement does not somehow retroactively waive a defense from the prior proceeding.

In sum, the equitable-tolling theories do not justify a COA. The thread by which those theories hang—that we should calculate Blount's limitations period using a date all agree is wrong—is too thin to make the issue debatable.⁶

⁶ Our dissenting colleague writes that we have conducted a “full-blown merits review” rather than a threshold COA inquiry. Dissenting Op. at 743, 744-45. To his accusation that we [“focus] squarely on the merits,” *id.* at 745, we admit that *some* review of the merits is unavoidable in “a threshold inquiry into the underlying merit of the claims,” Buck, 137 S.Ct. at 774 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). But he overstates the nature of our analysis. We have reviewed the merits only to answer a limited question: Are the issues close, or is it clear that dismissing Blount's petition was correct? To the extent the dissent objects to the *amount* of analysis we perform, we acknowledge that our opinion could have been shorter (though the outcome no different) had we merely computed the limitations period, *see* section II.A, and left it at that. But we thought it better for all if we described Blount's arguments for a different computation and explained why we found them clearly unavailing. We find it difficult to believe that the COA standard requires us to make our opinion more cursory. And to be clear, we have not impermissibly given “full consideration to the factual or legal bases adduced in support of the claims,” Buck, 137 S.Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029). We have done nothing more than reject Blount's timeliness theories on their face. We have also refrained from reaching a number of factual and legal questions in the case, including whether equitable tolling is required by *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005), or *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), and whether

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III

We conclude that jurists of reason would not find debatable the district court's procedural holding that Blount's petition was time-barred. We therefore deny Blount's request for a certificate of appealability.

So ordered.

Blount's IAAC claim is entitled to habeas relief. In the end, if our opinion looks to our dissenting colleague like a rejection of Blount's arguments on the merits, that is because, as the Supreme Court has observed, "when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious," *Buck*, 137 S.Ct. at 774. As we see it, we have simply asked whether Blount's arguments rise to the level of reasonable debate. We conclude that they do not.

WILLIAMS, Senior Circuit Judge, dissenting:

My colleagues have determined that no “jurists of reason would find ... debatable” whether Carlton Blount’s habeas petition is timely. See Maj. Op. at 736 (quoting *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000)). As a jurist formerly known as reasonable, I disagree. In the form of a Certificate of Appealability (“COA”) analysis, the majority performs a full-blown merits review on the timeliness of Blount’s petition—exhausting legal and factual arguments, crafting a new rule for interpreting state law, and invoking the court’s rarely-used discretion to forgive the government its concessions. Such an analysis is inappropriate at the COA stage, as the Supreme Court clearly held only a few months ago. *Buck v. Davis*, ___ U.S. ___, 137 S.Ct. 759, 197 L.Ed.2d 1 (2017). In fact, Blount’s contentions easily we perform, we acknowledge that our opinion could have been shorter (though the outcome no different) had we merely computed the limitations period, see section II.A, and left it at that. But we thought it better for all if we described Blount’s arguments for a different computation and explained why we found them clearly unavailing. We find it difficult to believe that the COA standard requires us to make our opinion more cursory. And to be clear, we have not impermissibly given “full consideration to the factual or legal bases adduced in support of the claims,” *Buck*, 137 S.Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029). We have done nothing more than reject Blount’s timeliness theories on their face. We have also refrained from reaching a number of factual and legal questions in the case, including whether equitable pass the Court’s threshold COA test. More importantly, once over that modest hurdle, Blount’s claims on appeal warrant a remand to the district court.

I first explain why Blount's claims entitle him to a COA, and, having done so, propose a merits disposition.

* * *

In 2001 a District of Columbia jury was asked to determine if Blount committed murder, a specific intent crime. Over defense counsel's objection, the trial court instructed the jury that Blount could be convicted even if he did not intend to commit murder. Transcript, *United States v. Blount*, No. F-983-00, at 73-75 (D.C. Super. Ct. Feb. 20, 2001). All the jury needed to find was that (1) Blount "intentionally participated]" in some crime and (2) that murder was a "natural and probable consequence" of that crime. *Id.* Blount was, quite unsurprisingly, convicted. On appeal, his new counsel neglected to raise the rejection of trial counsel's objection to the jury instruction, and the conviction was affirmed. Blount's conviction is thus marred by two *prima facie* constitutional errors. The jury instructions omitted necessary elements of the crime. See *United States v. Gaudin*, 515 U.S. 506, 509-10, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also *Wilson-Bey v. United States*, 903 A.2d 818, 826, 843-44 (D.C. 2006) (en banc) (finding the same jury instructions unconstitutional). And Blount's appellate counsel did not challenge the substance of these instructions, though the error was compelling and properly preserved. See *Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (articulating Sixth Amendment test for appellate counsel's "failure to raise a particular claim"); see also *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). His appellate lawyer's error, bound up with the trial court's error, is the subject of Blount's current petition.

Blount filed this petition (his second) over a dozen years after his conviction. Absent some reason to stop the clock, it would appear untimely against the one-year statute of limitations in 28 U.S.C. § 2244(d)(1). But Blount has offered two reasons for us to find him entitled to have the merits of his petition addressed.

First, Blount claims that he is entitled to equitable tolling of the statute of limitations as of the date he filed his first federal habeas petition. That petition contained the same claim as the current one, but it was dismissed for lack of exhaustion (Blount had not yet employed the District's device for seeking relief on his claim of ineffective appellate counsel, i.e., asking the D.C. Court of Appeals to recall its mandate). Assuming that the first petition was timely (a fact the government conceded), and assuming that it was improperly dismissed rather than stayed (a highly probable conclusion), Blount would be entitled to equitable tolling for a reasonable period, thereby overcoming the time barrier.

Second, and independent of the first argument, Blount asserts that the D.C. Court of Appeals reopened his case on October 11, 2012, when it adjudicated his motion to recall the mandate. As per *Jimenez v. Quarterman*, 555 U.S. 113, 129 S.Ct. 681, 172 L.Ed.2d 475 (2009), a state court's decision to re-open an appeal resets the limitations period. If the D.C. Court of Appeals in fact reopened Blount's case, then it would not have become "final" again until January 9, 2013, when the 90-day window closed on petitioning for certiorari of the October decision; § 2244(d)(1)'s one-year limit would thus give him until January 2014 to file a new petition. Blount filed his current petition in 2013, so it would also be timely if his reopener theory is correct.

My colleagues examine both issues, but they create a chimerical beast, neither COA nor merits analysis and in disregard of the sequence mandated by statute and the Supreme Court. Before *Miller-El v. Cockrell*, “[m]any Courts of Appeals decisions ha[d] denied applications for a COA only after concluding that the applicant was not entitled to habeas relief on the merits.” 537 U.S. 322, 348, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (Scalia, J., concurring). The Supreme Court put an end to that practice, declaring that a COA is a “threshold question” that “should be decided without ‘full consideration of the factual or legal bases adduced in support of the claims.’” *Buck*, 137 S.Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336, 123 S.Ct. 1029). A court cannot de facto “decid[e] the case on the merits” and then use that determination to deny the COA. *Id.* In *Buck* the Fifth Circuit had issued a brief unpublished opinion that “phrased its determination in proper terms” of the COA standard, *id.*, insisting that it was performing an “[i]nitial examination” and merely looking for any “plausible argument” on the merits, see *Buck v. Stephens*, 623 Fed. Appx. 668, 673-74 (5th Cir. 2015). But the Court looked past those recitations to find that the Fifth Circuit’s analysis was “essentially” the same as would be performed on an actual merits review. *Buck*, 137 S.Ct. at 773.

The majority today also focuses squarely on the merits—but does so with even less pretense of a COA analysis than in the Fifth Circuit’s *Buck* opinion. Although a “thorough” consideration of the issues certainly suggests that we’ve moved beyond the COA stage, see *Buck*, 137 S.Ct. at 774, the primary fault of the majority opinion isn’t that it’s lengthy and detailed, compare Maj. Op. at 742-43 n.6; the problem, as we’ll see, is

that it resolves a number of subtle issues, clearly debatable among reasonable jurists (as here).

That is a “fundamental” error, *Miller-El*, 537 U.S. at 342, 123 S.Ct. 1029, though one whose correction would likely do Blount no good—the majority opinion leaves little doubt that my colleagues would deny the claim if they recognized the merits as being properly before the panel. In any event, the merits analysis they perform is not simply inappropriate at this stage; it is, as I explain after discussing the COA, incorrect.

To warrant a COA Blount need only show that reasonable jurists could disagree about *one* of his two procedural arguments, along with, of course, his constitutional claim of right. See *Slack*, 529 U.S. at 478, 120 S.Ct. 1595 (COA should be granted when the prisoner shows “at least” that reasonable jurists could disagree over both the procedural propriety and the substance of the petition). On the equitable tolling point, the government has insisted to us that Blount’s first habeas petition was timely. Gov’t Opposition to Mot. for COA, No. 15-5056, at 4 n.5 (July 27, 2015) (“Gov’t Opp.”); see Maj. Op. at 741. Given this concession, tolling for a reasonable period from that date could render the second petition timely as well.

But relying on our discretionary authority to forgive “the government’s [] failure,” my colleagues resolve that the first petition was time barred and that any tolling from that date would be pointless. Maj. Op. at 741-42. How such a forgiveness becomes indisputable among reasonable jurists I cannot fathom. In *Day v. McDonough*, 547 U.S. 198, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006), the Court found discretion in the courts to overlook a state’s mistaken assertion that a habeas petition was timely; it agreed with the state’s

contention that the exercise of that discretion should depend on “whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition.” *Id.* at 208-09, 126 S.Ct. 1675. The Court later cautioned in *Wood v. Milyard*, 566 U.S. 463, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012), that “appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved” and that they “should reserve” their *Day* “authority for use in exceptional cases.” *Id.* at 1834.

The majority disregards the principle of *Day v. McDonough*, paying no attention to its instruction to consider whether the administration of justice is better served by holding the government to its concession. Instead the majority insists that Blount’s argument would require deviating from certain “correct dates” and expresses doubt that a “waiver or forfeiture could ever lead a reasonable jurist” to deviate so, at least not without justification beyond the concession itself. Maj. Op. at 741-42. But under *Day* and *Wood* those doubts are misplaced. And treating Blount’s first petition as timely would not require changing any of the majority’s reconstructed dates. As the majority agrees that equitable tolling would begin “when Blount filed his first federal habeas petition,” *id.* at 741, and the government conceded the timely filing of that petition, Gov’t Opp. at 4 n.5, the majority’s calculations merely show that Blount needs what is being requested: equitable tolling for every day *between* the first and second petitions.

It makes no difference that the government never waived its statute of limitations defense to the current, second petition. Maj. Op. at 742-43. The government’s explicit concession that Blount’s *first* petition was “filed ... within the one-year statute of limitations,” Gov’t

Opp. at 4 n.5, if accepted by us, opens the door to equitable tolling and defeats the government's general timeliness objection to the *second*. Under the Court's cases, the government's concession (even if erroneous) should be excused only in "exceptional" circumstances. See *Wood*, 132 S.Ct. at 1834; *Day*, 547 U.S. at 209-10, 126 S.Ct. 1675. The majority offers nothing remotely exceptional here.

In exercising the discretion allowed by *Wood* and *Day*, my colleagues have chosen to respond to the government's errors with easy magnanimity, and to Blount's diligence with merciless exactitude. This approach is particularly troubling given the strength of Blount's underlying *Strickland* argument. See *Rhines v. Weber*, 544 U.S. 269, 278, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005) (courts should be wary of dismissing "potentially meritorious" habeas claims). And regardless of how my colleagues treat the government's concession, they are incorrect to insist on fully resolving that issue at the COA stage. "[A] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337, 123 S.Ct. 1029.

In some cases, a choice might be discretionary but nonetheless obvious to any reasonable jurist. Not so here, where the default rule lies in Blount's favor (a party must live with its concessions) and Blount's constitutional claim is likely to succeed. Blount's equitable tolling argument is hardly one we can say all reasonable jurists would reject. He has thus made the necessary showing on the procedural part of the COA. (Blount's *Jimenez* theory would also survive the threshold analysis suitable for a COA, but as Blount's equitable tolling argument is enough to earn him a COA for review of

the district court's procedural holding, I discuss *Jimenez* only below, as an alternative route for reversal in the appeal proper.)

The substance of Blount's *Strickland* claim also deserves a COA. When it adjudicated Blount's motion to recall the mandate, the D.C. Court of Appeals "did not decide" the first *Strickland* prong, deficiency, but may have ruled on the second prong, prejudice—reasonable jurists would therefore decide deficiency *de novo* and review prejudice with deference to that court. See *Porter v. McCollum*, 558 U.S. 30, 38-39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009); see also 28 U.S.C. § 2254(d). In *Robbins*, the Supreme Court adopted the Seventh Circuit's formula for ascertaining deficiency when counsel omitted an issue on appeal: appellate advocacy is constitutionally deficient when "ignored issues are clearly stronger than those presented." 528 U.S. at 288, 120 S.Ct. 746. Blount has offered more than enough evidence on this front. His appellate counsel neglected to challenge the unconstitutional jury instructions even though that challenge had been preserved by trial counsel and those instructions "w[ere] under active criticism and discussion at the time," *Blount v. United States*, No. 08-CO-959, 983 A.2d 1064, slip op. at 1 (D.C. Nov. 10, 2009) ("*Blount II*") (affirming denial of post-conviction relief for the jury instruction error, because Blount's appellate counsel had no "cause" to omit that claim). The minor weaknesses of this argument—e.g., the possibility that the error could be found harmless, see *Neder v. United States*, 527 U.S. 1, 4, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)—offer scant reason for omitting it. And it remains far more compelling than the points Blount's appellate counsel did raise, contentions almost bound to lose, such as that the court admonished trial counsel too harshly during cross-examination and that

it was error to give an accomplice instruction because the indictment failed to allege accomplice liability. See *Blount v. United States*, No. 01-CF-974, 859 A.2d 651, slip op. at 3-7 & n.12 (D.C. June 29, 2004) (“Blount I”) (affirming conviction on direct appeal).

As for the prejudice prong, the D.C. Court of Appeals stated that “based upon the entire record, any error was harmless due to the overwhelming evidence presented at trial.” *Blount v. United States*, No. 01-CF-974, 859 A.2d 651, slip op. at 1 (D.C. Oct. 11, 2012) (“*Blount IIP*”) (order adjudicating motion to recall the mandate). That analysis misses the nuance of the test mandated by *Robbins*: whether there is “a reasonable probability that, but for his counsel’s unreasonable failure ... he would have prevailed on his appeal.” 528 U.S. at 285, 120 S.Ct. 746. Thus it would suffice for Blount to show, as he has, a reasonable probability that the original appellate panel would have rejected the government’s claim of harmlessness beyond a reasonable doubt. When you multiply a fraction of a burden (reasonable probability) by a fraction of a burden (rebutting government’s contention that the jury instruction made no difference beyond a reasonable doubt), you get a *smaller* fractional burden: Blount need establish only a reasonable probability that the government might not have established harmless error. The D.C. Court of Appeals was incorrect to require Blount to rebut the government’s harmlessness contention entirely. Whether that mistake amounts to an “unreasonable application” of *Strickland*, reasonable jurists might debate. See 28 U.S.C. § 2254(d). And that is all that Blount need show “at this stage,” where “we only ask whether ... deference” to the state court decision is “debatable amongst jurists of reason.” *Miller-El*, 123 S.Ct. at 1042.

For these reasons, the majority should have granted the COA rather than issue, as they did, an advisory opinion on the merits followed by a summary denial of the COA. As I find grounds for granting the COA, I now proceed to the appeal proper, on which I find the majority's advisory opinion mistaken. Readers may wonder why I did not simply grant the certificate myself and thus provide my colleagues with jurisdiction to reach the merits decision that they do. A circuit judge acting alone is authorized to grant a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. Pro. 22(b)(1)-(2). But as far as I can tell, no judge has ever taken that step in this court, certainly not after panel oral argument. I have chosen not to do so partly out of comity but more out of futility; a move to the more difficult appeal stage would—so far as appears—not yield a difference in my colleagues' conclusion. Nonetheless, I now move on to the merits, the logical sequel to my view on the COA.

* * *

Turning to “full consideration” of the procedural merits, *Buck*, 137 S.Ct. at 773, I find Blount entitled to equitable tolling—covering the time spent adjudicating Blount's first federal petition as well as the short periods it took him to go from our court back to the D.C. Court of Appeals and from there back to federal court. (Blount's time litigating the motion to recall the mandate can be tolled as a matter of course. See Maj. Op. at 740 n.4.) Equitable tolling is appropriate under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214, when the prisoner “has been pursuing his rights diligently” and “some extraordinary circumstance stood in his way.” *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010). Blount has certainly been diligent. He filed his motion to recall just 31 days after

the COA on his first petition was denied. Compare *Blount v. Wilson*, No. 117060 (D.C. Cir. Sept. 27, 2011) (denying COA) with Mot. to Recall Direct Appeal Mandate, *Blount v. United States*, No. 01-CF-974 (mailed October 28, 2011). As for an extraordinary blocking circumstance, that can be found in the ill-advised handling of Blount's first petition, which the district court (along with this court) construed too narrowly and dismissed too readily, rather than holding it in abeyance for Blount to exhaust his District remedy.

Blount had not exhausted his *Strickland* claim before he brought his first petition. But "pleading errors may be corrected through the liberal construction or amendment we are accustomed to providing a *pro se* prisoner." *Davis v. U.S. Sentencing Comm'n*, 716 F.3d 660, 667 (D.C. Cir. 2013). Blount's *Strickland* claim was intertwined with one that had been exhausted in District post-conviction proceedings: that the jury charge was unconstitutional. See *Blount v. Wilson*, No. 11-7060, at 1-2 (noting that the first petition appeared to raise both claims). Blount had already challenged those instructions via the District's procedure for post-conviction relief, D.C. Code § 23-110. See *Blount II* at 1. Although the D.C. Court of Appeals acknowledged that the instructions were "improper," it affirmed the denial of that challenge because he had not raised the issue on direct appeal. *Id.* When his federal habeas petition is read to focus on that claim, the *Strickland* argument still plays a role; it serves to excuse his procedurally defaulting in his direct appeal. See *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000). Blount's first petition then, was a mix of both exhausted and unexhausted claims. And "it likely would be an abuse of discretion for a district court to deny a stay and dismiss a mixed petition if the

petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines*, 544 U.S. at 278, 125 S.Ct. 1528. Blount's mixed petition satisfied each *Rhines* element.

First, Blount's unexhausted claim had considerable merit; second, his failure to exhaust was due, at least in part, to the District's byzantine process for pursuing *Strickland* claims of appellate representation; and third, he did not—and had no incentive to—engage in "dilatory litigation tactics," as those tactics would prolong his time in prison. Dismissing Blount's first petition also ran counter to our precedent on unexhausted *Strickland* claims flowing to us from the D.C. Court of Appeals. In *Streater v. Jackson*, 691 F.2d 1026 (D.C. Cir. 1982), a petitioner for federal habeas for ineffective assistance of appellate counsel had been stymied by the then prevailing uncertainty in the District over where such a claim could get review. Recognizing the interaction between that confusion and the requirement of exhausting state remedies, we held the federal petition in abeyance so that the petitioner could pursue whatever the District might offer. *Id.* at 1028. Both *Rhines* and *Streater* show that Blount's first petition should have been stayed, not dismissed.

Equitable tolling would correct this unfortunate mistake and retroactively stop the clock during the pendency of Blount's first petition and during the reasonable amount of time it took Blount to file his motion to recall and his second federal habeas petition. The district court was incorrect to deny Blount equitable tolling, and its decision should be reversed.

Blount's *Jimenez* claim also warrants reversal. The D.C. Court of Appeals views its procedure for *Strickland*-based motions to recall the mandate (its sole remedy for constitutionally defective appellate counsel) as a two-step process. There is a decision on the motion itself, and then, if the motion is granted, full consideration of the *Strickland* claim and the merits of the recalled appeal. See *Long v. United States*, 83 A.3d 369, 378 & n.15 (D.C. 2013).

The parties here appear to agree that the first stage does not qualify as a reopening under *Jimenez* but that the second does. That shared assumption seems a reasonable reading of *Jimenez*, where the Court specifically found that, as a matter of plain meaning, 28 U.S.C. § 2244(d)(1)(A)'s trigger for the AED-PA's one-year habeas limitations period—"the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review"—encompasses not only standard conclusion of direct review but also instances where a state court re-opens and re-concludes direct review. 555 U.S. at 11920, 129 S.Ct. 681.

But as *Long* itself illustrates, the D.C. Court of Appeals may collapse into a single proceeding its grant of the motion to recall and its adjudication of the reopened appeal. 83 A.3d at 378 n.15.¹ A composite pro-

¹ There are, practically speaking, three steps combined in *Long*: an initial *Strickland* inquiry when reviewing the motion to recall the mandate; the post-recall complete *Strickland* analysis; and the adjudication of the claim that should have been brought in the original appeal. *Id.* at 378-84 (performing initial *Strickland* analysis, full *Strickland* analysis, and plain error analysis simultaneously, then remanding to district court because there was plain error). Performance of either of the latter two steps would indicate re-opening.

cess would also count as re-opening direct review, and Blount claims this occurred in his case. In *Long* the movant ultimately prevailed in the reopened appeal, but there is nothing preventing the use of *Long*'s streamlined process in cases where the movant ultimately loses (as did Blount). The two steps in the D.C. Court of Appeals's process impose successively increasing burdens on the defendant: he need only show "sufficient merit" to pass the first stage but can only prevail in the second stage after the court "fully explores" his *Strickland* claim. *Griffin v. United States*, 598 A.2d 1174, 1175-76 (D.C. 1991) (emphasis and internal quotation marks omitted). As a matter of logic, a court can, in a single proceeding, find that a movant clears the lower hurdle but not the higher one. Indeed, this ladder of increasing burdens should sound familiar: it is the process AEDPA's COA provision calls for us to follow here—analyze the COA and then (if we grant the COA) address the merits.

My colleagues recognize the possibility of a combined grant-and-reject process. See Maj. Op. at 738-39. But they insist that when the D.C. Court of Appeals claims it has dismissed a motion at the first stage, we must end our inquiry, even if that court's "reasoning ... mirrors the reasoning it would use on a reopened appeal." *Id.* at 739. They reject Blount's "notion" of analyzing what a state court actually *did*, preferring to treat as final what it *said it did*. See *id.*

Blount's "notion," though, flows from the Supreme Court's command: we are to analyze the state court decision to see if "in fact" it re-opened the appeal. *Jimenez*, 555 U.S. at 120 n.4, 129 S.Ct. 681. "[F]or purposes of applying" AEDPA provisions "that interact[] with state procedural rules, we look to how a *state procedure functions*, rather than the particular name that

it bears.” Carey v. Saffold, 536 U.S. 214, 223, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002) (emphasis added). Federal courts applying AEDPA are admonished not to take what the state court said it was doing “as an absolute bellwether” for what it actually did. *Id.* at 226, 122 S.Ct. 2134. Doubtless there may be close cases, such as this one, but accepting the burden of adjudicating these cases is, in the Supreme Court’s judgment, radically preferable to willful ignorance. Closing ourselves off to reality does no honor to state courts and no justice to habeas petitioners.

Still, my colleagues contend that horrendous consequences would flow from treating a denial of a motion to recall the mandate as a reopening of the appeal—even in cases where the state court’s reasoning “mirrors” what it “would use on a reopened appeal.” Maj. Op. at 739-40. The majority envisions prisoners evading time limits altogether as they endlessly filed frivolous motions to recall the mandate. See *id.* But state and federal courts have formidable tools to prevent such gamesmanship. First, the D.C. Court of Appeals invites little chance of re-opening when it follows its standard practice of dismissing motions to recall when they are facially insufficient. Here though, the court issued multiple orders, noted the apparent sufficiency of Blount’s claims, and applied the legal standard appropriate for a re-opened appeal. See Dissent, *infra*, at 740-41. Second, there is the District’s 180-day deadline for motions to recall the mandate, after which the D.C. Court of Appeals may dismiss a motion procedurally with no hint of re-opening. D.C. Ct. App. R. 41(f). The court waived that bar in Blount’s case, further indicating its desire to plumb the merits. Finally, any fear of meretricious reopening must assume extraordinary sloppiness on the part of federal courts in interpreting

state court decisions. We are quite capable of comprehending that though all cats have four legs (with a few exceptions), not all animals with four legs are cats. Characterizing a motion to recall as frivolous may “mirror[]” a merits dismissal for frivolity, but the reasoning would be inconsistent with any idea that the court went on to the second stage of its procedure. Compare Maj. Op. at 739-40.

I would follow the Supreme Court’s example in *Carey*, looking to the substance of the D.C. Court of Appeals’s decision, not its form. Judged from this perspective, the decision almost certainly re-opened Blount’s appeal. After Blount filed his motion, the D.C. Court of Appeals released an order noting that “the jury may have relied upon the aiding and abetting instruction which included the ‘reasonable and probable consequences’ language this court held to be unconstitutional”; requesting a response from the government; and concluding that Blount “appear[ed]” to have raised a viable *Strickland* claim. Order, *Blount v. United States*, No. 01-CF-974 (D.C. Aug. 29, 2012). Thus the court seems to have concluded that “on their face” Blount’s claims had “sufficient merit,” see *Watson v. United States*, 536 A.2d 1056, 1060 (D.C. 1987) (plurality); see *Griffin*, 598 A.2d at 1176, and that it was necessary “to consider more fully and then decide” whether a *Strickland* violation had occurred, see *Stratmon v. United States*, 631 A.2d 1177, 1178 (D.C. 1993) (internal quotation marks omitted). That is precisely the reasoning the D.C. Court of Appeals uses when it “recall[s] the mandate.” See *Stratmon*, 631 A.2d at 1178.

Consistent with this interpretation of the first order, the court’s next order on Blount’s motion appears to involve the type of “full[] explor[ation]” one expects in a recalled appeal. See *Griffin*, 598 A.2d at 1176. As

mentioned in my discussion of Blount's *Strickland* claim, the second order invoked the precise legal test, harmless error, that should govern the reopened appeal. See *Blount III* at 1. Thus it went well beyond what would have been necessary simply to deny recall of the mandate. Compare Maj. Op. at 738-39. To be sure, the D.C. Court of Appeals's precedents on this issue are somewhat confusing. Despite case law asserting that the motions to recall are decided "on their face," *Watson*, 536 A.2d at 1060, the D.C. Court of Appeals once ordered "an evidentiary hearing by the trial court" on such a motion, *Stratmon*, 631 A.2d at 1180. But the best reading of the decisional array appears to be that the D.C. Court of Appeals's disposition of Blount's motion comprised both a decision to recall and a decision on the merits. Thus this panel would have done well to find Blount's petition timely by virtue of *Jimenez* as well as the equities (and certainly within the realm of reasonable disagreement).

Finding grounds for granting the COA and for ultimately finding Blount's petition not time-barred, I would reverse on the timing issue and remand for the district court to address the merits of the constitutional claim. See *Mickles-El v. D.C. Gov't*, No. 98-7019, 1998 WL 846649, at *1 (D.C. Cir. Nov. 24, 1998).

I respectfully dissent.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-1938 (ABJ)

CARLTON BLOUNT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Document 16
Filed September 26, 2014

MEMORANDUM OPINION

This matter is before the Court on Carlton Blount's Pro Se Petition for Writ of Habeas Corpus and Attached Appendix Pursuant to 28 U.S.C. § 2254 [ECF No. 1] and the government's Motion to Dismiss Petitioner's Petition for a Writ of Habeas Corpus [ECF No. 10]. Because petitioner had an effective means to pursue his claim of ineffective assistance of trial counsel, and his claim concerning appellate counsel is time barred, the government's motion will be granted.

I. BACKGROUND

In the Superior Court of the District of Columbia, petitioner was convicted of first degree murder of Natasha Marsh while armed, second degree murder of Andre Wallace while armed, possession of a firearm during a crime of violence, conspiracy to assault with a dangerous weapon, obstruction of justice, and carrying a pistol without a license. Pro Se Petition for Writ of

Habeas Corpus and Attached Appendix Pursuant to 28 U.S.C. § 2254 ("Pet.") at 2 (page numbers designated by petitioner). The Superior Court imposed an aggregate sentence of 64 years to life imprisonment. *Id.* On June 29, 2004, petitioner's convictions were affirmed on direct appeal. See Pet., App. J (Memorandum Opinion and Judgment, *Blount v. United States*, No. 01-CF-974 (D.C. Ct. of App. June 29, 2004)); United States' Motion to Dismiss Petitioner's Petition for a Writ of Habeas Corpus ("Resp't's Mot."), Ex. C (docket sheet, *United States v. Blount*, No. 01-CF-0974 (D.C. Ct. of App. filed July 12, 2001)) at 2. Petitioner did not file a motion to recall the mandate until November 21, 2011. See Resp't's Mot., Ex. C at 1; Pet. at 5. The Court of Appeals denied the motion on October 11, 2012. See Resp't's Mot., Ex. F (Order, *Blount v. United States*, No. 01-CF-974 (D.C. Ct. of App. filed Oct. 11, 2012) (per curiam)).

On June 6, 2005, petitioner, who was then proceeding pro se, filed a motion for a new trial in the Superior Court under D.C. Code § 23-110. Pet. at 3. The government filed its opposition on November 9, 2005, and petitioner filed a reply on November 28, 2006 and a supplement on January 30, 2007. *Id.* The Superior Court appointed counsel to represent petitioner, and on January 29, 2008, counsel filed a reply to the government's opposition on petitioner's behalf. *Id.* at 4. The government filed its response on March 12, 2008. *Id.* The Superior Court denied petitioner's motion on July 23, 2008. *Id.* The Court of Appeals affirmed the decision and issued its mandate on December 2, 2009, and on October 4, 2010, the Supreme Court of the United States denied petitioner's petition for a writ of certiorari. See *Blount v. United States*, 983 A.2d 1064 (D.C. 2009) (table), *cert. denied*, 131 S. Ct. 214 (2010).

Petitioner, again proceeding *pro se*, filed a second § 23-110 motion in the Superior Court on December 13, 2011; the motion was denied on March 6, 2012. See Pet. at 5; Resp't's Mot. at 5. The Court of Appeals affirmed the decision on May 2, 2013. Resp't's Mot., Ex. G (Memorandum Opinion and Judgment, *Blount v. United States*, No. 12-CO-380 (D.C. Ct. of App. May 2, 2013)).

Petitioner's last effort in the Superior Court was his Notice of Preservation to Reconsider First and Second § 23-110 Motions Due to the Intervening Decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) Handed Down by the United States Supreme Court on March 20, 2012. Pet. at 5. On consideration of the "notice" and the government's opposition, the Superior Court denied petitioner's request on June 21, 2013. *Id.* at 5-6.

II. DISCUSSION

A. *Ineffective Assistance of Trial Counsel*

Petitioner alleges here that he was denied a fair trial in the Superior Court, *see generally* Pet. at 32-44, particularly because of a jury instruction on aiding and abetting that he contends "allowed the jury to convict [him] of first and second degree murder without finding that [he] had the same mens rea as the principal," *id.* at 38. This Court is authorized to entertain a claim of trial court error or ineffective assistance of trial counsel only in limited circumstances. *See Williams v. Martinez*, 586 F.3d 995, 999 (D.C. Cir. 2009). D.C. Code § 23-110 "entirely divest[s] the federal courts of jurisdiction to hear habeas corpus petitions by prisoners who had a [§] 23-110 remedy available to them, unless the petitioner could show that the [§] 23-110 remedy was 'inadequate or ineffective.'" *Blair-Bey v. Quick*, 151 F.3d 1036, 1042 (D.C. Cir. 1998) (citing D.C. Code § 23-110(g)); *see*

Reyes v. Rios, 432 F. Supp. 2d 1, 3 (D.D.C. 2006) (stating that D.C. Code § 23-110 “provided the petitioner with a vehicle for challenging his conviction based on the alleged ineffectiveness of his trial counsel”); *Garmon v. United States*, 684 A.2d 327, 329 n.3 (D.C. 1996) (“A motion to vacate sentence under [§] 23-110 is the standard means of raising a claim of ineffective assistance of trial counsel.”).

Here, petitioner fails to demonstrate that the remedy available to him under § 23-110 was inadequate or ineffective; he raised his concerns under § 23-110 twice, and he had the assistance of counsel when he presented them to the Superior Court the first time. So this Court does not have jurisdiction to hear petitioner’s claim for ineffective assistance at the trial level.

B. Ineffective Assistance of Appellate Counsel

A claim of ineffective assistance of appellate counsel falls outside the scope of D.C. Code § 23-110. See *Williams*, 586 F.3d at 998. “[B]ecause the Superior Court lacks authority to entertain a [§] 23-110 motion challenging the effectiveness of appellate counsel, that section is, by definition, inadequate to test the legality of [petitioner’s] detention.” *Id.* But ordinarily, an ineffective assistance of counsel claim is litigated in the District of Columbia Court of Appeals on a motion to recall the mandate. See *Watson v. United States*, 536 A.2d 1056, 1060-61 (D.C. 1987) (en banc). This Court may review a “federal habeas petition asserting ineffective assistance of appellate counsel,” but only after a petitioner has “moved to recall the mandate in the [District of Columbia] Court of Appeals.” *Williams*, 586 F.3d at 999. This case comes before this Court after such a motion was denied by the District of Columbia Court of Appeals.

Petitioner contends that appellate counsel “failed to raise ... preserved issues” on appeal, including arguments regarding “the erroneous [aiding and abetting] instruction.” Pet. at 45. A claim of ineffective assistance of appellate counsel is evaluated under “the standard set forth in 28 U.S.C. § 2254.” *Williams*, 586 F.3d at 1002.

In relevant part, § 2254 provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A federal court does not grant a habeas petition unless it appears that:

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Id. § 2254(b)(1).

An individual convicted in and sentenced by the Superior Court of the District of Columbia is considered a state prisoner for purposes of § 2254. See *Smith v. United States*, No. 00-5181, 2000 WL 1279276, at *1 (D.C. Cir. Aug. 23, 2000) (per curiam) (A “conviction in the Superior Court of the District of Columbia is considered a state court conviction under federal habeas law,” and a challenge to a Superior Court conviction is “properly brought under 28 U.S.C. § 2254.”).

“Effective April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) ... impose[d] a 1-year period of limitation on motions brought under [28 U.S.C. § 2255].” *United States v. Saro*, 252 F.3d 449, 251 (D.C. Cir. 2001) (citation omitted). And “[c]ourts have generally applied the same analysis to the time limitations in § 2254 and § 2255.” *United States v. Cicero*, 214 F.3d 199, 203 n.* (D.C. Cir. 2000) (citations omitted).

The limitation period for the filing of a petition under § 2254 is set forth in § 2244. See *Wright v. Wilson*, 930 F. Supp. 2d 7, 9 (D.D.C. 2013). It runs from the latter of four possible dates:

- (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 rec-

ognized 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). The limitation period is tolled while “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” *Id.* § 2244(d)(2). Review is pending “until the application has achieved final resolution through the State’s post-conviction procedures,” *Carey v. Saffold*, 536 U.S. 214, 220 (2002), including any appeals in the state courts. A criminal conviction becomes final when the Supreme Court “affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.” *Clay v. United States*, 537 U.S. 522, 527 (2003); *see* S. Ct. R. 13(1) (setting 90-day deadline for filing a petition for writ of certiorari).

Petitioner’s convictions became final on or about January 20, 2005, or 90 days after the Court of Appeals issued its mandate on October 21, 2004. The one-year limitation period would have ended on or about January 20, 2006. Before the limitation period expired, however, petitioner filed his first § 23-110 motion in the Superior Court. Thus, the limitation period ran for approximately 136 days, from January 21, 2005 through June 6, 2005, when petitioner filed his first motion under § 23-110 in the Superior Court. At that point, approximately 229 days of the limitation period remained. Proceedings with respect to petitioner’s first § 23-110

motion concluded on October 4, 2010, when the Supreme Court denied his petition for a writ of certiorari. The limitation period began to run again on October 5, 2010, and expired 229 days later, on Saturday, May 21, 2011 (or the next business day, Monday, May 23, 2011).

For purposes of this discussion, the United States, *see* Resp't's Mot. at 6 n.6, and the Court treat the petition as if it were filed on September 18, 2013, the date on which petitioner "handed to prison officials, postage prepaid, the instant § 2254 petition and attached appendix ... for mailing to the United States District Court [for the] District of Columbia," Pet. at 59 (Certificate of Mailing). Using that date, it is clear that the instant petition was filed more than two years after the limitation period expired, and therefore, the petition is time-barred.¹

Because the limitation period is not jurisdictional, it "is subject to equitable tolling," *Holland v. Florida*, 560 U.S. 631, 645 (2010), where the movant demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing," *id.* at 649 (citation and internal quotation marks omitted); *see Norman v. United States*, 467 F.3d 773, 775 (D.C. Cir. 2006) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)) (finding that equitable tolling is denied "where a [petitioner] 'failed to exercise due diligence in preserving his legal rights' or showed only 'a garden variety claim of excusable neglect'").

¹The filing of petitioner's second § 23-110 motion did not serve to toll the limitation period because it was filed on December 13, 2011, roughly 9 months after the limitation period already had expired.

Here, petitioner contends that he has pursued his rights diligently, *see* Petitioner's Reply to the Government's Motion to Dismiss Petitioner's Habeas Corpus Petition Under 28 U.S.C. § 2254 [ECF No. 15] ("Reply") at 5, and he recounts his efforts to seek relief in the District of Columbia courts under D.C. Code § 23-110 and this district court under 28 U.S.C. § 2241.² *See* Reply at 6-7. He first notes that "neither the court of appeals, nor appellate counsel for indigent appellants, inform[ed]" him of his "right" to seek recall of the Court of Appeals' mandate, which for him would have been the first opportunity to litigate an ineffective assistance of appellate counsel claim. *Id.* at 2. Petitioner also explains that, as a District of Columbia Code offender incarcerated in federal facilities, he lacked "the benefit of ... trained legal assistance versed in D.C. law and rules of the courts." *Id.* at 3. He further explains that his efforts were hampered by his confinement in segregated housing units, delays in sending and receiving mail, delays in acquiring transcripts, transfers among correctional institutions, and limited access to his legal papers and the law library. *See id.*, App. K (Motion to Recall Direct Appeal Mandate) at 1-2. While petitioner may have been diligent, he has not demonstrated that extraordinary circumstances prevented him from filing a petition within the one-year limitation period.

² Petitioner's petition for a writ of habeas corpus under 28 U.S.C. § 2241 was dismissed for lack of jurisdiction. "[T]his Court provide[d] no forum for the claim of ineffective assistance of appellate counsel because [Petitioner] ha[d] neither stated nor shown that he moved in the District of Columbia Court of Appeals to recall the mandate and his request was denied." *Blount v. Wilson*, No. 11-0743, 2011 WL 1526945 (D.D.C. Apr. 19, 2011). Petitioner since has filed a motion to recall the mandate, which the Court of Appeals denied on October 11, 2012. *See* Resp't's Mot., Ex. F.

Neither petitioner's lack of access to a law library, nor his inability to secure transcripts, nor his transfer from one correctional facility to another is considered to be an extraordinary circumstance. *See, e.g., United States v. Destine*, __ F. Supp. 2d __, __, 2014 WL 294500, at *5 (D.D.C. Jan. 28, 2014) (finding that petitioner whose "only explanation ... his delay is that he "was in the special housing unit, with no access to a law library to file a timely § 2255 [motion]," demonstrated neither extraordinary circumstance nor diligent pursuit of his rights to warrant equitable tolling). Petitioner's placement in segregative detention without access to his legal papers and to a law library is not an extraordinary circumstance either. *See Cicero*, 214 F.3d at 204 (finding that petitioner whose convictions became final in 1994 failed to demonstrate extraordinary circumstances to warrant equitable tolling despite showing that, during last six months of limitations period ending on April 24, 1997, he "was separated from his legal papers during a transfer between prisons"). Nor is an untimely filing excused because of a petitioner's "ignorance of the law or unfamiliarity with the legal process." *Id.* at 203 (citing *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999)).

Furthermore, even if petitioner had filed this petition on time, he has not demonstrated that his local remedy for an ineffective assistance of appellate counsel claim was inadequate or ineffective. He had available to him the option of filing in the Court of Appeals a motion to recall the mandate, a remedy he eventually pursued in November 2011. "[T]he availability of such a course precludes the finding of inadequacy or ineffectiveness required to maintain jurisdiction in this Court." *Hewitt v. Smith*, No. 05-1861, 2006 WL 1722330, at *3 (D.D.C. June 20, 2006). And according to

petitioner, the Court of Appeals decided his motion to recall the mandate on the merits rather than on procedural grounds. *See* Reply at 9-11. His lack of success did not render the remedy inadequate or ineffective either. *See Collier v. United States*, No. 99- 5120, 1999 WL 1336229, at *1 (D.C. Cir. Dec. 15, 1999) (per curiam) ("Failure to prevail [on a motion to recall the Court of Appeals' mandate] does not render his local remedies inadequate or ineffective."), *cert. denied*, 529 U.S. 1118 (2000); *see also* *Garris v. Lindsay*, 794 F.2d 722, 727 (D.C. Cir. 1986) (per curiam) ("It is the inefficacy of the remedy, not a personal inability to utilize it, that is determinative, and appellant's difficulty here is simply that his circumstances preclude him from invoking it.").

III. CONCLUSION

The Court concludes that petitioner's petition for a writ of habeas corpus is time-barred, and that he had access to effective procedures for post-conviction relief in the District of Columbia courts. The government's motion to dismiss therefore will be granted. An Order is issued separately.

/s/

AMY BERMAN JACKSON
United States District Judge

DATE: September 25, 2014

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-1938 (ABJ)

CARLTON BLOUNT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Document 19
Filed January 7, 2015

MEMORANDUM OPINION AND ORDER

This matter is before the Court on petitioner's Pro Se Motion for Reconsideration Pursuant to Fed. R. Civ. P. 59(e) [ECF No. 18]. A motion under Rule 59(e) is "disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Niedermeier v. Office of Max S. Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001) (citing *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057 (D.C. Cir. 1998)). Such a "motion ... not be granted unless the district court finds that there is an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (internal quotation marks and citation omitted).

The Court granted respondent's motion to dismiss petitioner's petition for a writ of habeas corpus as time-barred. *See Blount v. United States* ___, F. Supp. 3d ___,

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2014 WL 4916273 (D.D.C. Sept. 25, 2014). According to petitioner, the one-year limitation period within which to file his petition for a writ of habeas corpus began to run on October 11, 2012, when the District of Columbia Court of Appeals issued its ruling on his motion to recall the mandate. See Mot. for Recons. at 3. Under the controlling statute, however, the limitation period began when petitioner's convictions became final in 2011. The filing of his petition on September 18, 2013 therefore was untimely.

It is hereby

ORDERED that petitioner's Pro Se Motion for Reconsideration Pursuant to Fed. R. Civ. P. 59(e) [18] is DENIED.

SO ORDERED.

/s/

AMY BERMAN JACKSON
United States District Judge

DATE: January 7, 2015

51a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-1938 (ABJ)

CARLTON BLOUNT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Document 24
Filed March 13, 2015

MEMORANDUM OPINION AND ORDER

The Court granted respondent's motion to dismiss petitioner's petition for a writ of habeas corpus as time-barred. *See Blount v. United States*, F. Supp. 3d, 2014 WL 4916273 (D.D.C. Sept. 25, 2014). Petitioner since has filed a motion for reconsideration, ECF No. 18, which the Court denied on January 7, 2015, ECF No. 19. On February 24, 2015, he filed a Pro Se Notice of Appeal and a Pro Se Motion for a Certificate of Appealability, ECF Nos. 20-21. The United States Court of Appeals for the District of Columbia Circuit has held the appeal in abeyance pending this Court's resolution of the motion for certificate of appealability.

The time period within which to file a petition under 28 U.S.C. § 2254 was one year from "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)(A) (emphasis added). This Court found that petitioner's convictions be-

came final on or about January 20, 2005, or 90 days after the District of Columbia Court of Appeals issued its mandate on October 21, 2004, having affirmed petitioner's convictions on direct appeal. Taking into account the time proceedings with respect to petitioner's collateral attack by motion under D.C. Code § 23-110 were pending, petitioner's one-year limitation period expired on or about May 23, 2011. The filing of his habeas petition in federal district court on September 18, 2013, therefore, was untimely.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Such a showing may include a demonstration that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). The Court concludes that petitioner fails to make the requisite showing.

Petitioner contends that reasonable jurists could debate whether the petition should have been resolved differently based on the Supreme Court's ruling in *Jimenez v. Quarterman*, 555 U.S. 113 (2009). See Pet'r's Mot. at 4-5. The *Jimenez* "decision . . . is a narrow one," *Jimenez*, 555 U.S. at 686, predicated on a Texas court ruling expressly granting the petitioner "the right to file an out-of-time appeal," *id.* at 683, because he previously had been "denied his right to a meaningful appeal." *Id.* In that limited circumstance, "where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before [he] has first sought federal habeas relief,

his judgment is not yet 'final' for purposes of § 2244(d)(1)(A)[,]" and would not become "final [until] the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal." *Id.* at 686-87.

According to petitioner, the District of Columbia Court of Appeals "reopened [his] direct criminal appeal and first [collateral attack by motion under D.C. Code § 23-110], and heard [his] motion to recall the mandate on the merits," even though he filed the motion to recall the mandate out of time. Pet'r's Mot. at 4. Because he filed his § 2254 petition in this Court within one year of the Court of Appeals' ruling on the motion to recall its mandate, he asserts that the petition is timely. *See id.* at 4-5. In petitioner's case, however, his direct appeal not only commenced but also had become final years before he filed the motion to recall of the Court of Appeals' mandate. Furthermore, the fact that the District of Columbia Court of Appeals entertained his untimely motion to recall its mandate does not amount to an express grant of a right to file a direct appeal out of time. Petitioner's reliance on *Jimenez* is misplaced.

Accordingly, it is hereby

ORDERED that petitioner's Pro Se Motion for a Certificate of Appealability [21] is DENIED.

SO ORDERED.

/s/

AMY BERMAN JACKSON
United States District Judge

DATE: March 13, 2015

54a

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5056
September Term, 2015
1:13-cv-01938-ABJ

CARLTON J. BLOUNT,

Appellant,

v.

UNITED STATES OF AMERICA
AND DISTRICT OF COLUMBIA,

Appellees.

Document #1599552
Filed February 18, 2016

ORDER

BEFORE: Tatel, Griffith, and Millett, Circuit
Judges

Upon consideration of the motion for a certificate of appealability, the response thereto, combined with a motion to dismiss, and the opposition to the motion to dismiss, it is

ORDERED that the motion for a certificate of appealability and the motion to dismiss be referred to the merits panel to which this appeal is assigned. The parties are directed to address in their briefs the issues presented in the motions rather than incorporate those arguments by reference. It is

FURTHER ORDERED, on the court's own motion, that

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David Lehn
WilmerHale
1875 Pennsylvania Avenue NW
Washington DC 20006

a member of the bar of this court, be appointed as amicus curiae to present arguments in favor of appellant.

Per Curiam

56a

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5056
September Term, 2017
1:13-cv-01938-ABJ

CARLTON J. BLOUNT,

Appellant,

v.

UNITED STATES OF AMERICA
AND DISTRICT OF COLUMBIA,

Appellees.

Document #1704321
Filed November 14, 2017

ORDER

BEFORE: Henderson and Griffith, Circuit Judges;
Williams*, Senior Circuit Judge

Upon consideration of appellant's petition for panel rehearing filed on July 21, 2017, the brief for court-appointed amicus curiae in support of petition for rehearing and rehearing en banc, the response to the petition, and the reply, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

57a

BY: /s/
Ken R. Meadows
Deputy Clerk

* Senior Circuit Judge Williams would grant the petition.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5056
September Term, 2017
1:13-cv-01938-ABJ

CARLTON J. BLOUNT,

Appellant,

v.

UNITED STATES OF AMERICA
AND DISTRICT OF COLUMBIA,

Appellees.

Document #1704324
Filed November 14, 2017

ORDER

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins*, Circuit Judges

Appellant's petition for rehearing en banc, the brief for court-appointed amicus curiae in support of the petition for rehearing en banc, the response to the petition, and the reply were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

FOR THE COURT:

Mark J. Langer, Clerk

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BY: /s/
Ken R. Meadows
Deputy Clerk

* Circuit Judge Wilkins did not participate in this matter.

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 01-CF-974
F983-00

CARLTON J. BLOUNT, *Appellant,*
v.

UNITED STATES, *Appellee.*

(Argued June 17, 2004
Decided June 29, 2004)
Filed June 29, 2004

Appeal from the Superior Court of the
District of Columbia
(Hon. Russell F. Canan, Trial Judge)

MEMORANDUM OPINION AND JUDGMENT

Before TERRY, REID and GLICKMAN, *Associate Judges.*

Appellant Carlton J. Blount was convicted of first-degree murder while armed (premeditated) (of Natasha Marsh), in violation of D.C. § Code 22-2401, -3202 (1996);¹ the lesser-included offense of second-degree murder while armed (of Andre Wallace); possession of a firearm during a crime of violence, in violation of § 22-3204 (b);² conspiracy to assault with a dangerous weap-

¹ Recodified at D.C. Code § 22-2101, -4502 (2001).

² Recodified at D.C. Code § 22-4504 (2001).

on, in violation of § 22-105a, -502;³ obstruction of justice, in violation of § 22-722 (a)(2); and carrying a pistol without a license, in violation of § 22-3204 (a).⁴ He noticed an appeal, challenging various aspects of his jury trial. We affirm the trial court's judgment.

FACTUAL SUMMARY

The record before us shows that on February 8, 2000, the day of the murders of Natasha Marsh and Andre Wallace, both students at Wilson High School, Carlton Blount, a former Wilson student, celebrated his birthday. He spent the morning shopping with his friends, Jermaine Johnson⁵ and Julian Jones at the Annapolis Mall, and in Georgetown. Later that day, around 7 p.m., Carlton and Julian, joined by Jermaine, and other friends, drank Moet champagne and Remy Martin before going to a varsity basketball game at Wilson High School in Jermaine's black Ford Expedition truck.

After their arrival at the game, a Fight erupted between Andre and Carlton. Julian "[r]an over" to assist Carlton and hit Andre before school security pulled him back. Carlton was attempting to get away while Andre was pursuing him, "still punching" him. After the Fight had been broken up, Carlton stated to Andre:

³ Recodified at D.C. Code § 22-1805a, -402 (2001).

⁴ Recodified at D.C. Code § 4504 (a) (2001). The trial court imposed a prison sentence in the aggregate of 64 years to life.

⁵ With respect to the murders of Andre Wallace and Natasha Marsh, Jermaine Johnson entered a plea of guilty to two counts of manslaughter while armed, and agreed to testify for the government, in exchange for the government's indication that it would seek a sentence of ten to thirty years on each count; the counts would run consecutively.

"I'm going to see you later, I'm going to get you." One witness heard Carlton say to Andre "two or three times" - - in an angry and very loud voice: "Let me get my hammer, let me get my hammer." Another witness saw Carlton coming out of the gym, in an "angry" mood, with his "shirt... ripped ... like he had just been in a Fight," and heard him say: "I'm about to go get my hammer." Both witnesses understood "hammer" to mean "[a] gun."

Later, Carlton and Jermaine departed the school premises in Jermaine's truck. Jermaine described Carlton as "mad," and "hyper." Carlton told Jermaine "he was going to f _ _ k the dude, Andre, up," a statement which he repeated "a lot of times." His voice was "high pitched" and he also asserted: "[F] _ _ k him up, he punch me in my face, I'm going to f _ _ k him up." At Carlton's request, Jermaine drove to Carlton's mother's apartment building. There Carlton got a gun from his room, put it on his waist and covered it with a T- shirt. Jermaine saw the bottom of the gun sticking out from under Carlton's T-shirt.

When Carlton left his mother's house, he looked for Andre and Natasha. He did not Find them at Wilson; he used Jermaine's cell phone in an effort to locate them. Eventually Jermaine drove Carlton to 17th Street, N.E. where Natasha lived. Carlton was still "hyper" and after a while, Jermaine left him.

Later, Jermaine picked up Julian and drove to the area of Natasha's house. Jermaine saw Carlton, stopped, and Carlton got into the truck. Jermaine parked about a block away from Natasha's house and the three young men sat in the truck for about "Fifteen, twenty minutes." Carlton again used Jermaine's cell phone. He called Tia Harris "several times" in another

effort to locate Natasha and Andre. After one of the conversations with Tia, Carlton announced: "They at the grocery store." Jermaine drove to a Giant grocery store, but Natasha and Andre could not be found inside the store; so he returned to the area of Natasha's home. Carlton was "mumbling to himself," and said: "Whenever I see him I'm going to fk him up."

Jermaine began to watch the television that was situated in the dashboard of his truck. About Fifteen minutes later, Andre and Natasha drove up in her mother's car. Carlton exclaimed, "You see, there they go right there." Carlton got out of the truck, and "r[a]n down the sidewalk." Julian observed that Carlton, Natasha and Andre were "arguing" or "fussing" and directed Jermaine to "[g]o around there." Jermaine pulled his car around the corner. Carlton fired at Andre and Natasha. Jermaine was in "shock." Andre and Natasha fell to the ground. Jermaine watched as Carlton "walk[ed] over towards [Andre and Natasha] [and] fired some more shots."⁶ Jermaine drove away, leaving Carlton at the scene of the crime. Julian "said, 'Stop, man, you can't leave him.'" Jermaine stopped his truck and Carlton climbed in the back. When asked why he shot Andre and Natasha, Carlton replied: "F _ _ k that s _ _ t. They can't be playing with me like that." Jermaine dropped Julian⁷ and Carlton near the Fort Totten Metro station, and went to Tia's house, and later to Carlton's home.

⁶ Nakia Jackson, a school bus driver, who was visiting her mother's home, which is next door to the Marsh home, heard a loud argument outside and witnessed the murders from a third-floor window. She also saw the black truck and described the shooter.

⁷ Julian Jones was not charged in this case.

When Carlton and Jermaine saw each other outside Carlton's home later that night, Jermaine informed Carlton that Andre and Natasha were dead. Carlton responded: "So, f _ _ k that s _ _ t, I do my time or whatever, I ain't tripping off that." The next morning, Jermaine drove Carlton to a street near Providence Hospital where Carlton retrieved the gun used in the murders from an alley. Jermaine drove to Haines Point where he directed Carlton to throw the gun in the water. When Carlton just stood there, Jermaine "took [the gun] from him ... and [] threw it in the water."

The defense theory of the case was that Julian Jones, rather than Carlton Blount fired the gun that killed Natasha and Andre, and that Julian had displayed guns on prior occasions. The defense attempted to show that Julian had a motive to shoot Andre because Julian's girlfriend had been intimate with Andre, and that Julian more closely fit the description of the person who shot Andre and Natasha.

ANALYSIS

Mr. Blount raises several challenges to his convictions. We address only two of them in any detail and summarily dispose of the others.

Mr. Blount contends that the trial court "erred and infringed his [constitutional Sixth Amendment] rights to effective counsel by publicly admonishing and leveling ethics charges against his defense counsel who had acted in conformance with [the court's] earlier rulings." He singles out the trial court's admonition during defense cross-examination of Mr. Jones about his prior possession of a gun. He claims that "defense counsel was denounced before the jury as a habitual wrongdoer" and that the denunciation "necessarily tainted Mr. Blount."

Before cross-examination of Mr. Jones, defense counsel proffered that a witness saw Mr. Jones with a gun in 1999 and again "on New Year's Eve of 2000"; and that he had fired shots into the air in 1999 and 2000. The prosecutor raised objections, and the trial court declared:

[Assuming this proffer is accurate - - that Mr. Jones had a weapon, it seems to me that the fact that the witness can't describe it goes more to the weight of the testimony, not its admissibility. However, I'm not inclined - - although I will hear you about it - - I am not inclined to hear any evidence that he actually discharged the weapon, that seems to me irrelevant.

Defense counsel responded: "That's fine, Your Honor."

On cross-examination, defense counsel established Mr. Jones' possession of a 9mm automatic gun in the winter of 1999, and eventually asked: "And that's not the only time you possessed a gun in the winter of '99, you had a gun that you pulled out to squash a beef that you were having in a club one night in the winter of '99?" Government counsel objected and the trial judge called a bench conference. When the prosecutor asserted that defense counsel's question was "outrageous," the trial court asked defense counsel to "explain [her]self" because the court had allowed her to "get into possession of the gun but not the facts surrounding its use." Defense counsel's explanation and the trial court's reaction followed:

[DEFENSE COUNSEL]: Your Honor, my understanding of the Court's ruling is that you said we could ask about the prior possession of

the gun, we could not ask about him firing the gun. That was my understanding.

THE COURT: That's an outrageous misrepresentation you just made, [defense counsel]. I'm going to excuse the jury at this time.

The court then told the jury that defense counsel had asked an inappropriate question; that it was not the first time she had done so; and that the government's objection was sustained.⁸ After the jury had been excused, the trial court very sternly admonished defense counsel for "flaunt[ing] the Court's orders," and indicated "there are at least five or six incidents where the defense has just decided to march on either in direct contravention of Court orders or knowing full well that prejudicial information would be presented before the jury." The trial judge revealed that if defense counsel repeated the violation of a court order, it would "instruct [the] jury, because I believe that it's my responsibility to conduct a fair trial, a fair trial for Mr. Blount, which is why I allowed this line of testimony over the objection of the government, but that was not to allow you to exploit that. . . ." Later, co-defense counsel moved for a mistrial, in essence because, in his view, the trial court's admonition and inference that the de-

⁸ Specifically, the trial court told the jury:

Ladies and gentlemen, unfortunately not for the first time counsel has asked a question that was inappropriate and should never have been asked. So I'm sustaining the objection to the question and going to instruct you specifically to disregard that last question. It's like it never happened. The question was inappropriate. We had talked about it before. Counsel knew it was inappropriate and asked the question anyway. I'm sustaining the objection. You're to completely disregard that question. It doesn't exist.

fense had acted unethically had compromised Mr. Blount's right to a fair trial. The trial court denied the motion, concluding that its remarks were "measured and considerate," and that, essentially, it could not tolerate violations of the court's procedures and rulings.⁹

We recognize that an accused has a Sixth Amendment constitutional right to "representation that is free from conflicts of interest." *Thomas v. United States*, 685 A.2d 745, 751 (D.C. 1996) (quoting *Witherspoon v. United States*, 557 A.2d 587, 590 (DC. 1989) (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981))). Where a defendant establishes that his attorney has "an actual conflict of interest [that] adversely affect[s] [the] lawyer's performance," we presume prejudice. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). Prejudice is not presumed, however, where the defendant shows only

⁹ In denying the defense motion for a mistrial, the trial judge asserted:

I in fact have advised counsel at the bench that should I perceive th[at] counsel is going to violate the Court's procedures or previous rulings, that there had [to] be some consequence... so that the defense could just not continually violate Court orders and Court procedures. Because it's unfair to the government to ask controversial, inflammatory questions knowing that the[y] are controversial and inflammatory. Particularly when knowing that they w[ere] subject to previous orders not to go into those areas. And both sides in this case are entitled to a fair trial. And in my view it's simply not fair when one side chooses to go into controversial and inflammatory matters, particularly when those matters [have] been ruled upon, go into them nonetheless with the obvious intent to prejudice the jury. And it seems to me, quite frankly, my remarks were measured and considerate. Because I actually think counsel's questioning along those lines was quite frankly outrageous under the circumstances.

that there is a potential conflict of interest, or the possibility that representation will be affected adversely because of another interest of counsel, *see Veny v. United States*, 738 A.2d 1185, 1193 (D.C. 1999), such as avoidance of a referral to attorney disciplinary authorities, or where there is "competition between the client's interests and the counsel's own interests [which] 'corrupts the relationship,'" *United States v. Logan*, 302 U.S. App. D C. 390, 401, 998 F.2d 1025, 1036 (1993) (Mikva, J., dissenting) (citation omitted). Furthermore, while "it is essential that the defense attorney be free of any conflict of interest which might dilute her loyalty to her client," *Chase v. United States*, 656 A.2d 1151, 1153 (D.C. 1995) (citation omitted), "[a] trial judge has an obligation to prevent improprieties during the trial, and may rebuke counsel for improper conduct," *id.* at 1155 (citing *United States v. Logan*, *supra*, 302 U.S. App. D.C. at 394, 998 F.2d at 1029).

Here, the record is devoid of any showing of actual conflict of interest, or even a potential conflict of interest requiring further inquiry. Moreover, the trial court did not threaten defense counsel, in the presence of the jury, with sanctions or referral to Bar Counsel for unethical behavior. Rather, the trial court informed the jury that defense counsel had asked an inappropriate question after being told not to do so. Although with hindsight the rebuke may have appeared harsh, it was not the first rebuke during cross-examination of Mr. Jones.¹⁰ The rebuke was well within the trial court's

¹⁰ Earlier in the cross-examination of Mr. Jones, defense counsel asked three questions using a phrase that Julian had used during direct examination, "jail material." One question was, "you have spent time in jail, haven't you?" The trial court immediately admonished defense counsel during a bench conference, saying in part: "Clearly asking the witness if he spent time in jail is a very

obligation to control the trial proceedings so that neither the prosecution nor the defense would suffer unfair prejudice. *See Chase, supra; Logan, supra.* Defense counsel was not cited for contempt, nor referred to Bar Counsel. Furthermore, defense counsel already had established, prior to the rebuke by the trial judge, that Mr. Jones possessed a 9mm automatic gun in his possession in the winter of 1999, and that "at some point during the new year" (*i.e.*, 2000) he had a gun. Asking more questions foreseeably could have led to a revelation that Mr. Jones fired the gun, but that would have violated the court's direct order that counsel could inquire as to whether Mr. Jones "had a weapon" on a prior occasion but not that "he actually discharged the weapon." In short, given the record before us, Mr. Blount cannot prevail on his argument that the trial court's admonition of defense counsel "infringed his [Sixth Amendment] rights to effective counsel" and "necessarily tainted [him]."

Mr. Blount also argues that the trial court's response to a juror's note, during trial, concerning Mr. Blount's use of his left hand while his trial was in progress constituted error. At least one witness testified that the shooter used his right hand. Neither the prosecution nor the defense pursued the question of which hand the shooter used, nor whether Mr. Blount's dominant hand was the right one or the left one.¹¹ While the

potentially inflammatory statement." In the presence of the jury, the trial judge said: "Ladies and gentleman, that last objection is sustained. You are to disregard the question. That last question is stricken from the record."

¹¹ Had the defense addressed this question, the government was prepared to show that Mr. Blount had used his right hand to shoot a gun two years prior to his trial. While the trial court never

trial court did not respond immediately to the juror's note, it did include an instruction, as part of its final charge to the jury. The trial judge told the jury, in part, to "only [] consider the evidence that has been admitted at trial," "how the defendant writes has not been admitted into evidence"; and "the defendant is entitled to write notes during the course of the trial, and there is nothing at all inappropriate or wrong about him so doing." Defense counsel objected to this instruction.

On appeal, Mr. Blount contends that the jury should have been allowed to use its common sense and that the trial court's instruction was unresponsive to the juror's note. We review this matter for abuse of discretion. See *Davis v. United States*, 641 A.2d 484, 495 (D.C. 1994). And, we adhere to the legal principle that "the jury may consider only matter that has been received in evidence." *Edwards v. United States*, 785 A.2d 292, 294 (D.C. 2001) (citation omitted); *Keys v. United States*, 767 A.2d 255, 259 n.4 (D.C. 2001) (citation omitted). Moreover, a comment upon the demeanor or appearance of a defendant in the courtroom is deemed to be "the presentation of unsworn testimony"; hence, such comment is disallowed. *Villacres v. United States*, 357 A.2d 423, 426 n.4 (D.C. 1976) (citation omitted). The trial court correctly applied the legal principles in this case since no evidence was introduced as to whether Mr. Blount was dominant left or right-handed. And, the court gave a balanced instruction that favored neither the prosecution nor the defense.¹²

ruled on the use of such evidence, it expressed the view that such testimony might be prejudicial.

¹² Mr. Blount maintains that the trial court erred by giving an aiding and abetting instruction because he was charged only as a principal. The decision to give an aiding and abetting instruction is committed to the sound discretion of the trial court. See *Haw-*

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Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.

So ordered.

FOR THE COURT:

/s/

GARLAND PINKSTON, JR.
Clerk of the Court

thorne v. United States, 829 A.2d 948,952 (D.C. 2003) (citation omitted). Where "there is clear and convincing evidence that the defendant was present and participating in the crime," an aiding and abetting instruction is proper. *Gayden v. United States*, 584 A.2d 578, 582 (D.C. 1990) (citation omitted). The defense in this case presented evidence, which if believed, could establish that Julian Jones, not Carlton Blount was the shooter, but there also was ample evidence that Carlton Blount was present and participating in the crimes charged. Thus, the aiding and abetting instruction was proper.

We are unpersuaded by Mr. Blount's remaining arguments. The trial court did not abuse its discretion when it allowed the lead detective in this case to explain why he ruled out Mr. Jones as the shooter. His explanation constituted "background" information concerning his investigation and was properly admitted. *See Perritt v. United States*, 640 A.2d 702, 705 (D.C. 1994). Even assuming it was not background information, there was substantial testimony prior to that of the detective which, if credited, established beyond a reasonable doubt that Mr. Blount was guilty of the charges against him. Therefore, Mr. Blount was not substantially prejudiced. Finally, Mr. Blount's argument that statements made by the prosecutor during rebuttal amounted to "inflammatory rhetoric" is unsupported by the record when the complained of statements are viewed in context. *See United States v. Young*, 470 U.S. 1, 14(1985). But even assuming that the statements were improper, they did not "rise to the level of substantial prejudice." *Diaz v. United States*, 716 A.2d 173,181 (D.C. 1998).

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 08-CO-959
F983-00

CARLTON J. BLOUNT,

Appellant,

v.

UNITED STATES,

Appellee.

(Submitted September 21, 2009
Decided November 10, 2009)
Filed November 10, 2009

Appeal from the Superior Court of the
District of Columbia, Criminal Division
(Hon. Russell F. Canan, Trial Judge)

MEMORANDUM OPINION AND JUDGMENT

Before: GLICKMAN and BLACKBURNE-RIGSBY, *Associate Judges*, and STEADMAN, *Senior Judge*.

PER CURIAM: On collateral attack of his convictions at a jury trial for first-degree and second-degree murder, appellant asserts that the trial court erred in denying his § 23-110 motion based on a trial court instruction that was admittedly improper under our subsequent decision in *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (en banc).

The trial court denied the motion without a hearing on the ground that appellant had failed to show the

requisite cause and prejudice to entitle him to collateral review of an issue where he has not raised that issue on direct appeal. *Cook v. United States*, 932 A.2d 506, 507-08 (D.C. 2007). Appellant argues that he met the cause requirement because his trial counsel raised a *Wilson-Bey*-type objection and his appellate counsel was justified in not raising the issue on direct appeal because the validity of the instruction was at that time clear under local law. This, however, does not justify the failure to raise the issue on direct appeal, which is the critical point, when, as *Wilson-Bey* itself discusses, the correctness of such an instruction was under active criticism and discussion at the time. *Bousley v. United States*, 523 U.S. 614 (1998); *Engle v. Isaac*, 456 U.S. 107 (1982).

With respect to the prejudice prong, the government makes a strong case for the application of a standard that at best would be that of *Kotteakos v. United States*, 328 U.S. 750 (1946). See *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *United States v. Frady*, 456 U.S. 152 (1982); see also *Washington v. United States*, 834 A.2d 899, 902-03 (D.C. 2003). But it argues that the prejudice requirement was not met here even under the standard of *Chapman v. California*, 386 U.S. 18 (1967). In response, appellant observes that on direct appeal, the government prevailed in its argument that the evidence was sufficient to justify an aiding and abetting instruction. Since appellant has failed to show cause, we need not make a definitive ruling with respect to *Chapman*, but we do observe that we agree with the government that the error was harmless at least under *Kotteakos*, substantially for the reasons set forth in the government's brief on pages 28-37. See also *Washington, supra*, 834 A.2d at 904. For the foregoing reasons, it is

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ORDERED and ADJUDGED that the judgment
on appeal be, and hereby is, affirmed.

ENTERED BY DIRECTION OF THE COURT:

/s/

Garland Pinski, Jr.
Clerk of the Court

Copies to:

Hon . Russell F. Canan

Carlton J. Blount, pro se
FR#05015-007 USP Pollock
P. O. Box 2099
Pollock, LA 71467

Roy W. McLeese III, Esq.
Assistant U. S. Attorney

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 01-CF-974
2000 FEL 983

CARLTON BLOUNT,

Appellant,

v.

UNITED STATES,

Appellee.

Filed August 29, 2012

ORDER

BEFORE: Glickman, Associate Judge, and Terry and Reid,* Senior Judges.

On consideration of appellant's motion to recall the mandate, the lodged supplement to the motion, and it appearing that, in finding appellant guilty of murder, the jury may have relied upon the aiding and abetting instruction which included the "reasonable and probable consequences" language this court held to be unconstitutional in *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006), and it further appearing that while trial counsel objected to the instruction as improperly eliminating the essential element of *mens rea*, appellate counsel did not raise the *Wilson-Bey* issue on direct appeal, it is

* Judges Terry and Reid were associate judges at the time the mandate issued in 2004.

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ORDERED, *sua sponte*, that the Clerk shall file the lodged supplement to the motion to recall mandate. It is

FURTHER ORDERED that appellee shall within 30 days from the date of this order file a response to the motion to recall mandate addressing the issues raised in appellant's motion, including whether appellant's counsel on appeal rendered deficient performance in failing to challenge the constitutionality of the aiding and abetting instruction, and if so whether there is a reasonable likelihood that this court would have granted appellant a new trial. Regarding these questions, we note that our decision in the appeal from the denial of appellant's motion for a new trial pursuant to D.C. Code§ 23-110, case no. 08-C0-959, did not decide whether appellate counsel's performance was deficient or whether (even if the claim had been asserted on appeal) the *Wilson-Bey* error would not have entitled appellant to relief because it was harmless beyond a reasonable doubt. It is

FURTHER ORDERED that the motion to recall mandate is held in abeyance until further order of the court.

PER CURIAM

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 01-CF-974
2000 FEL 983

CARLTON BLOUNT,

Appellant,

v.

UNITED STATES,

Appellee.

Filed October 11, 2012

ORDER

BEFORE: Glickman, Associate Judge, and Terry and Reid,* Senior Judges.

On consideration of appellant's motion to recall the mandate, the supplement to the motion, this court's August 29, 2012, order directing appellee to file a response, and the government's response, it is

ORDERED that the motion to recall mandate is denied. Appellant argues that the trial court's "natural-and-probable-consequence" instruction on aiding and abetting violated this court's subsequent decision in *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (en banc) and that his appellate counsel was ineffective for failing to raise this issue in his direct appeal. However, based upon the entire record, any error was

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harmless due to the overwhelming evidence presented at trial and the government's theory that appellant was the sole shooter. Therefore, appellant has not met the high standard necessary to recall the mandate. *See Watson v. United States*, 536 A.2d 1056, 1060-61 (D.C. 1987) (en banc) (standard for demonstrating ineffective assistance of appellate counsel).

PER CURIAM

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