No. 25-726

In the
Supreme Court of the United States

ALAN LANE HICKS,

Petitioner,

v.

JONATHAN FRAME,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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The Fourth Circuit recognized that the 27 years of delay in hearing Petitioner Alan Lane Hicks's state habeas claims "offends basic notions of how a state should treat its prisoners." App. 19a. But it held that the state court's eleventh-hour, one-sentence order dismissing Hick's petition on a technicality was dispositive on the question whether the state-court process is "ineffective." 28 U.S.C. § 2254(b)(1)(B)(ii). In so doing, it joined the First and Tenth Circuits on the minority side of an entrenched conflict as to whether late-breaking movement on a state-court docket establishes the effectiveness of a state postconviction process, regardless of what transpired earlier.

Unable to face down this square conflict, Respondent rewrites the question presented. The circuits agree, Respondent contends at length, that a totality-of-the-circumstances approach is appropriate in evaluating the effectiveness of the state process. True enough. But the courts are squarely in conflict as to whether recent docket activity in state court bears dispositive weight in the analysis. The Third, Sixth, Seventh, and Eighth circuits decline to give recent docket activity that dispositive weight. Indeed, the Seventh Circuit deemed a state process ineffective in a virtually identical posture.

As to the merits, Respondent takes an equally blinkered approach. Respondent contends that there is nothing to see here despite 27 years in which Hicks's case languished (including, for years, in front of judges who themselves had prosecuted him), all because the state court's one-line order dismissing the petition establishes the current effectiveness of the courts. But AEDPA requires more than that. Whether a state court can make the most egregious delays disappear

with a flick of the wrist is exactly the question that has divided the courts.

Respondent also throws up an array of asserted vehicle problems. None presents any obstacle to review. Indeed, the Fourth Circuit specifically declined to consider most of the asserted defects because Respondent did not raise the argument on appeal and because no comity was warranted in light of the state court's egregious conduct. This Court's review is warranted.

A. The decision below deepens an entrenched conflict on the question presented.

The circuits are split on the question whether late-breaking movement in state court itself establishes the effectiveness of a state-court proceeding. Respondent does not so much dispute that conflict as ignores it, contending that the circuits agree on a different question: whether a totality-of-the-circumstances inquiry applies in assessing the effectiveness of state process. Opp. 9–27. None of Respondent's arguments undermines a split on the actual question presented for this Court's review.

1. a. Respondent struggles mightily to recast the decision below, insisting that the court of appeals considered "all the relevant facts" and found recent state-court movement "significant enough" to render the state process effective overall. Opp. 1, 31. That misreads the decision. The court did not consider delay, responsibility, and diligence—the very "circumstances" central to the totality inquiry. 28 U.S.C. § 2254(b)(1)(B)(ii). Rather, it expressly declined to answer those "hard questions" because "West Virginia's last-minute action"—*i.e.*, the post-argument

state-court movement—made them unnecessary. App. 18a n.8.

The court of appeals' dispositive treatment of the fact of last-minute movement is particularly inescapable because the state court's one-line dismissal was itself inadequate as a matter of state law. The order on which the Fourth Circuit relied was a one-sentence dismissal that lacked findings of fact and conclusions of law, in violation of state law. See Order, *Hicks v. Trent*, No. CC-40-1997-C-369 (W. Va. Cir. Ct. Apr. 22, 2025). Even Respondent acknowledged as much to the highest state court, where he took the remarkable step of confessing error and requesting reversal, acknowledging that the one-line order was inadequate under state law (after the Fourth Circuit had already rendered its decision). Opp. 30 (citing Resp. Br., *Hicks v. Frame*, No. 25-351 (W. Va. Oct. 27, 2025)). But before this Court, Respondent tries to defend the Fourth Circuit's decision relying on that admittedly erroneous order. Opp. 31. The state court's procedurally irregular dismissal should have confirmed the ineffectiveness of the state's process, not rehabilitated it—let alone dispositively.

b. And the court of appeals was not alone in giving dispositive treatment to late-breaking state-docket activity. The First Circuit follows the same flawed approach. Respondent says that court "looks at everything in a case, and no one factor is dispositive." Opp. 12. But its lead case held that once the delayed state appeal was "formally revived" and "presently available," federal intervention was "not appropriate." *Layne v. Gunter*, 559 F.2d 850, 851–52 (1st Cir. 1977); see also Pet. 16–18 (collecting similar cases).

Respondent argues the Tenth Circuit "[r]ecogniz[es] how circumstance-specific these cases are" and therefore "takes a fact-focused approach." Opp. 25. But Respondent's own characterization of the case law recognizes that exhaustion remains required "[w]here the delay has come to a close." Opp. 26. And were there any doubt, Respondent's quoted passage goes on to say that reactivation will "compel" federal courts to require exhaustion. *Vreeland v. Davis*, 543 F. App'x 739, 742 (10th Cir. 2013).

In sum, the First, Fourth, and Tenth Circuits follow the same rigid rule: late-breaking state-court action bears dispositive weight and forecloses a federal habeas forum.

2. In contrast to the decision below, the Third, Sixth, Seventh, and Eighth Circuits treat recent state-court activity as a non-dispositive factor when deciding whether the state has furnished an effective corrective process. In those circuits, the state process Hicks experienced would have been deemed "ineffective," unlocking a federal forum.

Respondent makes only a halfhearted effort to reconcile the Seventh Circuit's decision in *Lindsey v. Neal*, 138 F.4th 1039, 1043–45 (7th Cir. 2025), with the decision below. Respondent first contends that the Seventh Circuit "didn't say that recent action by the state court is universally meaningless after a certain amount of delay." Opp. 21. Of course not. The question is whether recent action is dispositive, even where the delay spans years and the state's process has other serious deficiencies. Respondent also suggests that the nature of the state-court action in *Lindsey*—a hearing on a motion to dismiss—was different. Opp. 21–22. But Respondent cannot explain why the nature of the

state-court movement makes a difference. To the contrary: from the perspective of a petitioner hoping to obtain a state-court remedy, movement on a hearing in state court is more promising than a one-line dismissal on a technical ground (in violation of state law to boot), without a hearing, putting the petitioner back at square one.

The mistaken summary disposition here should have only confirmed that the process remains ineffective. *Cf. Lindsey*, 138 F.4th at 1045 (explaining that the motion to dismiss filed in state court showed "the State remains intent on dodging review rather than confronting the merits of Linsey's petition"). Under *Lindsey*, the state's eleventh-hour action in Hicks's case would have been one more circumstance to weigh against a record of decades-long state failure, not a reason to leave the "hard questions" unanswered. App. 18 n.8.

The same is true in the Sixth Circuit, which Respondent contends doesn't "allow exhaustion to be excused on delay alone." Opp. 19. But that, again, does not answer whether late-breaking state action becomes dispositive once it occurs. In the Sixth Circuit, it does not (as multiple decisions illustrate). See Pet. 11–13.

Respondent falls into the same trap when addressing the Third Circuit, rebutting an argument nobody made about whether that court "cuts off the exhaustion requirement after some predefined period of unjustified delay." Opp. 14. But Respondent correctly acknowledged that, in the Third Circuit, the burden shifts to the state to prove effectiveness in the face of a delay. Opp. 14. And he made no attempt to reconcile that approach with what the Fourth Circuit

did (and the Tenth and First Circuits do), when it held the state court's "last-minute action" alone ended the effectiveness inquiry. App. 18a n.8.

And again, in addressing the Eighth Circuit, Respondent points out that state-court "delay alone" is not enough to excuse non-exhaustion. Opp. 23. That, however, does not establish that the Eighth Circuit treats state-court reactivation alone as dispositive. Eighth Circuit precedents establish that, where (as here) gross delay is paired with other deficiencies, the state process would be deemed ineffective regardless of recent state-court-docket activity. See Pet. 15–16.

B. The decision below is incorrect.

Respondent does little to rehabilitate the court of appeals' decision on the merits. Section 2254(b)(1)(B)(ii) asks whether "circumstances exist that render" state process "ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1)(B)(ii). That language requires a court to confront the circumstances that made the state process ineffective—the exact "hard questions" the court dodged below. App. 18a n.8. Respondent contends that the question is whether state courts are "*presently* ineffective." Opp. 30. But the mere fact of movement on the state-court docket in the face of an adverse federal appellate decision—especially movement that itself is erroneous as a matter of state law—cannot establish state-court effectiveness.

The surrounding text confirms the point. Subsection (i) addresses "an absence of available State corrective process." 28 U.S.C. § 2254(b)(1)(B)(i). Subsection (ii), at issue here, separately addresses state process that remains nominally available but is "ineffective" in practice. *Id.* § 2254(b)(1)(B)(ii). If

"ineffective" meant only "unavailable" at the moment of decision, subsection (ii) would be superfluous. Congress used different words because the two exceptions do different work. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 145–46 (2012).

Otherwise, Respondent retreats to the argument that the court of appeals engaged in a holistic analysis that considered "all the circumstances." Opp. 31. As explained, that is not what the court of appeals said it was doing. Hicks's case had already endured decades of state failure, including forgotten motions and irreparably conflicted judges. The court itself described that history as a "Kafkaesque journey" that "offends basic notions of how a state should treat its prisoners." App. 3a, 19a. But once the state court issued its one-sentence dismissal, the Fourth Circuit declined to consider those circumstances and instead concluded that "it no longer appears that West Virginia's post-conviction system is ineffective to protect Hicks's rights." App. 17a. That turned what should have been a "holistic[]" evaluation of "circumstances," as Respondent concedes, Opp. 11, into a rigid, categorical rule.

The court's comity analysis makes the error even clearer. Exhaustion is a "rule of comity." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). But the Fourth Circuit held that, given West Virginia's delay, "comity towards any interest it might have in being the first to answer Hicks's claim is unwarranted." App. 14a; App. 15a n.7 (reiterating that "no comity is warranted"). A state that has already lost the comity interest exhaustion protects cannot resurrect that interest through a last-minute procedural gesture alone. If a state can let postconviction proceedings languish for

years and then defeat federal review by jolting the case just enough once federal intervention is imminent, § 2254(b)(1)(B)(ii) risks becoming a dead letter.

C. The question presented is exceptionally important and this case presents an ideal vehicle.

1. The question presented raises a fundamental question about access to habeas review and a state's ability to thwart that access—within and beyond its own courts. This case illustrates the stakes. Under the minority view the Fourth Circuit adopted, a state can engage (for decades) in conduct that "no doubt offends basic notions of how a state should treat its prisoners," App. 19a, and that will not be enough to show the state's process is "ineffective," so long as there's a last-minute docket entry in the state court—even if that entry violates its own state's law. The result is that innocent people and people subjected to constitutionally infirm convictions and sentences will be barred from postconviction review in any forum. See Br. of Innocence Network & Midwest Innocence Project as Amici Curiae at 19–23.

Sadly, the question arises often. Because every federal habeas petitioner must either exhaust state processes or satisfy an exception under § 2254(b)(1)(B), this threshold issue can arise in virtually any habeas case—about one out of every twenty civil cases in federal district courts. See Pet. 25. Clarity on this issue is particularly important; a habeas petitioner subjected to excessive delay and other deficiencies in state courts should not be subjected to additional extended proceedings—and results that depend on the accident of geography.

2. As the petition explained, this case is a perfect vehicle for the question presented. See Pet. 30–32. Respondent throws up a scattershot of purported vehicle problems. None poses any obstacle to review. Most of the purported problems Respondent identifies are alternative arguments that habeas relief might ultimately be denied. Opp. 27–30. But at most, those would be questions for remand. Respondent's invocation of those grounds is particularly surprising because the Fourth Circuit specifically declined to rely on them, explaining that Respondent forfeited them and that, given the circumstances, the state is not entitled to the "comity" of being saved from its own litigation errors. App. 14a, 14a n.7. So the decision below tees up the question presented in particularly pristine form.

Almost as audaciously, Respondent suggests that this case is a poor vehicle because it is "factually an outlier." Opp. 28. The fact that Hicks has suffered multiple "Kafkaesque" deficiencies in the state courts, App. 3a, is a reason that the question is presented here in especially stark terms, highlighting the outsized role the state's last-minute movement played. See Pet. 31.

Relatedly, Respondent contends that the Court should deny the petition because "[b]lame . . . will be hard to assign." Opp. 28. As an initial matter, the district court found that "the vast majority of delay is attributable to the State." App. 43a. In any event, nothing about the question presented asks the Court to apportion blame. The decision below was based on the state court's last-minute action alone, expressly leaving "unresolved the extent to which considerations like length of delay, blame for delay, and diligence by the petitioner" factor into non-exhaustion. App. 18a

n.8. The only question this Court would need to resolve is whether giving dispositive weight to that last-minute development was correct.

Relatedly, Respondent tries to drum up a jurisdictional problem by asserting issues with the district court's certificate of appealability. Opp. 29. While the failure to obtain a certificate is jurisdictional, a certificate's failure to specifically "indicate an issue is not." *Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012). Indeed, "[a] defective COA is not equivalent to the lack of any COA." *Id.* The Fourth Circuit thus expressly "decline[d]" to rule on this question. App. 14a.

Respondent's further suggestion that district-court judges lack the power to grant certificates of appealability borders on the frivolous. This Court has endorsed the practice, the circuits uniformly follow it, and the Federal Rules that this Court prescribed and that Congress approved expressly mandate it. *Thaler*, 565 U.S. at 143 n.5; 28 U.S.C. § 2254 Rule 11.

Finally, Respondent says this case is a poor vehicle because "Hicks's state case is ongoing." Opp. 29. But, of course, that is necessarily true for all cases implicated by the question presented. And for the reasons explained above, that question continues to divide the lower courts. As Hicks's case and others illustrate, state process that is "ongoing" does not always amount to state process that is "effective." See, *e.g.*, *Lindsey*, 138 F.4th at 1045. That is precisely why Congress made unavailability and ineffectiveness two distinct exceptions to the exhaustion requirement. 28 U.S.C. § 2254(b)(1)(B)(i)–(ii).

Respondent's herculean efforts to create a vehicle problem fall flat. Review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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