No. 01-1500

In the Supreme Court of the United States

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINION BELOW

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 App. 1a-6a) is unpublished but is available at 30 Fed.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

JURISDICTION

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

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of arson, in violation of 18 U.S.C. 844(i), and distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. He was sentenced to 137

months of imprisonment, to be followed by three years of supervised release. *Ibid.*; *United States* v. *Clay*, No. 98-1783, 1998 WL 847098, at *2 (7th Cir. Nov. 23, 1998) (165 F.3d 33 (Table)). The court of appeals affirmed his convictions. Pet. App. 2a. The district court denied petitioner's motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, but issued him a certificate of appealability. Pet. App. 2a-3a. The court of appeals affirmed the denial of the Section 2255 motion. *Id.* at 1a-6a.

1. During the summer of 1996, petitioner began selling crack cocaine to Tammy Sue Herring, who lived in a rented room in a house in South Bend, Indiana. Pet. App. 2a. In an apparent effort to settle Herring's drug debt to him, petitioner set the residence on fire. *Ibid.* The resulting blaze severely damaged the house and killed a dog and a kitten. *Ibid.*

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

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

3. On February 22, 2000, petitioner, acting *pro se*, filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Petitioner argued that the

indictment under which he was convicted failed to include the required mental state for arson and that his trial counsel rendered constitutionally ineffective assistance by (1) failing to move for judgment of acquittal on the arson charge based upon the purported lack of evidence that petitioner acted "maliciously"; (2) advising petitioner to "go to trial without any possible defense"; (3) failing to object to evidence of an out-of-court identification of petitioner; and (4) failing to raise several issues relating to sentencing. Motion under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody 5-6, 8. The government filed a response to the Section 2255 motion in which it argued that appellant's claims were "completely meritless." Gov't Response to 2255 Motion to Vacate, Set Aside, or Correct Sentence 1.

On May 4, 2000, petitioner filed a motion for leave to amend his Section 2255 motion. Motion for Leave to Amend 1. Petitioner tendered a proposed amendment adding claims that his sentence violated the Ex Post Facto Clause of the Fifth Amendment and that his lawyer rendered ineffective assistance by failing to advise him fully about a plea offer made by the government before trial. Amended Motion to Vacate Judgment or Sentence 1-2, 7-8.

On June 21, 2000, the district court filed a memorandum and order in which the court observed that 28 U.S.C. 2255 contains a limitations provision requiring, in pertinent part, that a federal prisoner file any motion for relief under Section 2255 within one year after the date on which his judgment of conviction becomes final. 6/21/00 Order 2. The court noted that "[petitioner's Section 2255] petition would seem to be time-barred" because he filed it more than one year after the court of appeals issued the mandate in his direct appeal, and

because he did not seek a writ of certiorari in this Court. *Id.* at 3. The court directed the parties "to show cause why [petitioner's Section 2255] petition should not be dismissed as untimely." *Id.* at 4.

The government filed a response to the court's memorandum and order in which the government acknowledged that petitioner's Section 2255 motion was untimely under Seventh Circuit law. Gov't Response to the Dist. Ct. Mem. and Order of June 21, 2000, at 1. The government explained, however, that the Department of Justice disagrees with the Seventh Circuit's interpretation of Section 2255's limitations provision and has instead adopted the position that "a conviction does not become 'final' under [Section] 2255 until expiration of the time allowed for certiorari review by the Supreme Court." *Id.* at 2 (quoting *Kapral* v. *United States*, 166 F.3d 565, 566 (3d Cir. 1999)). The government stated that "[petitioner's Section] 2255 Petition would be timely" under that construction of Section 2255. *Ibid.*

On August 2, 2000, the district court denied petitioner's Section 2255 motion and motion to amend. Pet. App. 7a-9a. Relying on *Gendron* v. *United States*, 154 F.3d 672, 674 (7th Cir. 1998) (per curiam), cert. denied, 526 U.S. 1113 (1999), the court stated that "when a federal prisoner in this circuit does not seek certiorari * * *, the conviction becomes 'final' on the date the appellate court issues the mandate in the direct appeal." Pet. App. 8a. Because petitioner did not file his Section 2255 motion until more than one year after that date, the court denied the motion as time-barred and rejected petitioner's subsequent motion to amend. *Id.* at 8a-9a. The court declined to excuse the late filing under the doctrine of equitable tolling (which petitioner had not raised) and declined petitioner's invitation to

grant relief under Rule 60(b) of the Federal Rules of Civil Procedure. Pet. App. 8a-9a.

Petitioner filed a notice of appeal, which the district court treated as an application for a certificate of appealability. 9/13/00 Order 1. After noting that, under 28 U.S.C. 2253(c)(2), "a certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right" (*ibid.*), the court concluded that the "indictment issue" raised in petitioner's Section 2255 motion "does not amount to the denial of a constitutional right" (9/13/00 Order 2). The court next listed the four ineffective assistance claims raised in petitioner's original Section 2255 motion and stated that "only one issue exists for purposes of appeal: Whether [petitioner's] Sixth Amendment right to effective assistance of counsel was violated." *Ibid.*

4. On April 11, 2001, the court of appeals granted the government's motion to strike petitioner's initial court of appeals brief because, in that brief, petitioner failed to address any of the four Sixth Amendment claims for which the district court had issued the certificate of appealability. 4/11/01 Order 1. Petitioner argued only that he "received [in]effective assistance of counsel because his sentence violates the Ex Post Facto Clause of the United States Constitution" (2/10/00 Pet. C.A. Br. 5-9), a claim that petitioner had not raised in his Section 2255 motion and which the district court had denied him leave to include in the motion by amendment. 4/11/01 Order 1. The court of appeals stated that "[petitioner] may file another brief. In addition to addressing the four [ineffective assistance claims], both [petitioner] and the United States should address whether the district court correctly dismissed [his] habeas corpus petition as untimely given that the government

apparently waived reliance on the statute of limitations." *Ibid.*

On May 9, 2001, petitioner filed a second opening brief in the court of appeals. In that brief, petitioner argued only that the district court erred in dismissing his Section 2255 motion as untimely. 5/9/01 Pet. C.A. Br. 3-8. The brief did not address his ineffective assistance claims or the question whether the government had waived reliance on the statute of limitations. *Ibid.* The government submitted an answering brief in which it argued that petitioner had forfeited his ineffective assistance claims by failing to address them in his second opening brief and that those claims lacked merit in any event. 8/8/01 Gov't C.A. Br. 9-14. The government once again explained that, although the district court had correctly dismissed petitioner's Section 2255 motion as untimely under Seventh Circuit law, the United States disagrees with the court of appeals' precedent on that issue. *Id.* at 15-24. Petitioner's reply brief addressed the timing issue (including the question whether the government had waived any statute of limitations defense) but failed to address either his ineffective assistance claims or the government's argument that petitioner had forfeited them. 9/21/01 Pet. C.A. Reply Br. 1-5.

5. On January 25, 2002, the court of appeals issued an unpublished order in which it affirmed the judgment of the district court dismissing petitioner's Section 2255 motion. Pet. App. 1a-6a. The court of appeals agreed with the district court's conclusion that petitioner's Section 2255 motion was untimely. *Id.* at 5a-6a. The court declined petitioner's "invitation to reconsider [its] holding in *Gendron*, although the government correctly point[ed] out that [*Gendron*'s] construction of section 2255 represents the minority view." *Id.* at 5a. After

noting that petitioner had filed his Section 2255 motion "sixty-nine days too late," the court "f[ou]nd that the district court was correct when it denied the motion." *Id.* at 6a.

ARGUMENT

Petitioner seeks (Pet. 4-7) this Court's review of when a conviction becomes final under Section 2255 para. 6(1) for purposes of calculating the start of the one-year limitations period for filing timely motions. He argues, and we agree, that his judgment of conviction did not become final until the time for filing a petition for a writ of certiorari had elapsed and that the courts of appeals are in conflict on that issue. Nonetheless, that narrow procedural disagreement does not merit this Court's intervention. Furthermore, this case would not be an appropriate vehicle for resolving that disagreement among the courts of appeals: petitioner has abandoned his underlying claims, which lack merit in any event, and he therefore would not be entitled to relief however this Court resolved that disagreement.

1. Before the enactment in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, there was no significant time limit on the filing of motions for collateral relief under Section 2255. See Rule 9(a) of the Section 2255 Rules; *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986) (interpreting corresponding state habeas corpus rule under 28 U.S.C. 2254); *United States* v. *Nahodil*, 36 F.3d 323, 327-328 (3d Cir. 1994) (applying *Vasquez* to a Section 2255 motion); *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) (under pre-AEDPA regime, the prisoner could "wait a decade" to file his collateral attack), rev'd on other grounds, 521 U.S. 320 (1997). In Section 105 of the AEDPA (110 Stat. 1220), however, Congress

established a "1-year period of limitation" for Section 2255 motions. The one-year period runs from "the latest of" four specified events. 28 U.S.C. 2255 para. 6. Here, the relevant triggering event is "the date on which the judgment of conviction becomes final." *Id.* para. 6(1). Congress did not define when a judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1).[1]

As petitioner observes, the courts of appeals are divided over when a judgment of conviction becomes "final" under 28 U.S.C. 2255 para. 6(1) in cases in which the defendant files an appeal but not a petition for a writ of certiorari. The Fourth and Seventh Circuits have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review. See *United States* v. *Torres*, 211 F.3d 836, 839-842 (4th Cir. 2000); *Gendron* v. *United States*, 154 F.3d 672, 673-675 (7th Cir. 1998) (per curiam), cert. denied, 526 U.S. 1113 (1999). Five other circuits have held, to the contrary, that a conviction does not become final until the time for filing a petition for a writ of certiorari expires. See *Kaufmann* v. *United States*, 282 F.3d 1336, 1337-1339 (11th Cir. 2002); *United States* v. *Gamble*, 208 F.3d 536, 537 (5th Cir. 2000); *United States* v. *Garcia*, 210 F.3d 1058, 1059, 1061 (9th Cir. 2000); *United States* v. *Burch*, 202 F.3d 1274, 1276-1279 (10th Cir. 2000); *Kapral* v. *United States*, 166 F.3d 565, 570-577 (3d Cir. 1999).

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[1] Congress also did not define the term "judgment of conviction." In general, a federal prisoner's "judgment of conviction" includes both the adjudication of guilt and the sentence. See Fed. R. Crim. P. 32(d)(1); *Deal* v. *United States*, 508 U.S. 129, 132 (1993). In our view, that general definition is applicable in Section 2255 cases as well.

In our view, the conclusion of the majority of the circuits is correct, for the reasons set forth in the brief for the United States in opposition to the petition for a writ of certiorari in *Garrott* v. *United States*, 531 U.S. 941 (2000) (No. 99-9743), *available at* 2000 WL 33152364. Consistent with the text of the AEDPA and the background definition of finality long-approved by this Court in the context of post-conviction review, a federal judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) only when the possibility of further direct appellate review is exhausted. When a defendant files a petition for a writ of certiorari, the judgment of conviction becomes final when the petition is denied; when a defendant does not file such a petition, the judgment of conviction becomes final when the time for filing the petition expires. Here, petitioner's conviction did not become final under Section 2255 until February 22, 1999, 90 days after the court of appeals' decision affirming his conviction and sentence on direct review. See Sup. Ct. Rule 13.1. Because petitioner filed his Section 2255 motion within one year after that date—on February 22, 2000—it was timely.[2]

2. Notwithstanding that petitioner's Section 2255 motion was timely, the conflict of authority on the issue of when a conviction is "final" under Section 2255 para. 6(1) does not warrant review by this Court. The court of appeals' mandate generally issues 21 days after the entry of judgment. See Fed. R. App. P. 40, 41. A

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[2] Petitioner's motion to amend and proposed amendment to the Section 2255 motion, on the other hand, were submitted on May 4, 2000, and, therefore, were untimely even under the correct construction of Section 2255 para. 6(1). Petitioner does not challenge that conclusion before this Court.

defendant has 90 days from the entry of the judgment to file a petition for a writ of certiorari. Sup. Ct. R. 13.1. Accordingly, because of the conflict among the courts, some defendants will have one year and 90 days from the entry of judgment by the court of appeals to file a Section 2255 motion, and others (such as petitioner) will have one year and 21 days—a difference of 69 days. Either time period will generally provide a sufficient opportunity for the filing of a Section 2255 motion. See Pet. App. 8a (rejecting equitable tolling because petitioner did not identify any "circumstances which might excuse his late filing").

Furthermore, because Section 2255 motions are filed in the district of sentencing, a federal prisoner can determine the specific timeliness rule governing his collateral attack long before the one-year limitations period begins to run. See *United States* v. *Marcello*, 212 F.3d 1005, 1009-1010 (7th Cir.) (in choosing between two reasonable interpretations of how to calculate a one-year limitations period, "what matters is establishing an unequivocal rule that lets litigants know where they stand"), cert. denied, 531 U.S. 878 (2000).[3]

Accordingly, the government believes that this Court's intervention to establish a uniform national rule is not necessary. This Court has denied at least two recent petitions raising this issue. See *Dunlap* v. *United States*, 122 S. Ct. 649 (2001) (No. 01-6014); *Wiley*

[3] With regard to petitioner's case, for instance, it has been firmly settled in the Seventh Circuit since before petitioner's direct appeal became final that, if certiorari is not sought, the one-year limitations period runs from the date on which the court of appeals issues its mandate. See *Gendron*, *supra* (decided Aug. 20, 1998). Thus, there is no unfairness in holding petitioner to the Seventh Circuit's rule.

v. *United States*, 528 U.S. 1006 (1999) (No. 99-5386). There is no reason for a different result here.[4]

3. This case would not, in any event, provide an appropriate vehicle for this Court's consideration of the question when a conviction becomes "final" for purposes of Section 2255 para. 6(1) because petitioner cannot obtain relief regardless of how the Court might resolve that question. Petitioner abandoned the ineffective assistance of counsel claims for which the district court issued a certificate of appealability by failing to raise those claims in any of his three briefs in the court of appeals. 2/10/01 Pet. C.A. Br. 1-8; 5/9/01 Pet. C.A. Br. 5-7; 9/21/01 Pet. C.A. Reply Br. 2-5. Under Rule 28(a)(9) of the Federal Rules of Appellate Procedure, the appellant's brief "must contain * * * appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." See also *Hojnacki* v. *Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002) ("A party waives any argument that it does not raise before the district court or, if raised in the district court, it fails to develop on appeal."). "Rule 28 applies equally to pro se litigants, and when a pro se litigant fails to comply with that rule,

[4] There also remains the possibility that the two circuits that have taken the minority view on the timeliness issue may reconsider that view as other courts of appeals adopt the majority position. Petitioner asserts that the conflict is "intractable" (Pet. 4) and supports that assertion by noting that the Seventh Circuit *panel* in this case declined to revisit the rule absent an opinion from this Court that calls into question Seventh Circuit precedent. The panel, of course, was not free to disregard Seventh Circuit precedent without such an opinion, but petitioner was free to seek rehearing en banc from the full Seventh Circuit. Petitioner declined to do so. In those circumstances, petitioner is ill-positioned to assert that the conflict among the courts of appeals cannot be resolved absent this Court's intervention.

[an appellate court] cannot fill the void by crafting arguments and performing the necessary legal research[.]" *Anderson* v. *Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) (citation omitted). Petitioner's failure to pursue his ineffective assistance claims is particularly inexcusable under the circumstances of this case because the court of appeals issued an order instructing him to raise the claims, 4/11/01 Order 1, and the government filed a brief contending that the claims lack merit, see 8/8/01 Gov't C.A. Br. 10-15.

As that brief explains, see 8/8/01 Gov't C.A. Br. 10-14, petitioner's ineffective assistance claims lack merit, and he therefore would not be entitled to any relief even if he had not abandoned his underlying claims. Petitioner's Section 2255 motion provided only vague and inconclusory allegations and contained virtually no citations to the record to support his claims. See Motion under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody 1-8. Accordingly, there is no basis for concluding either that counsel's performance was deficient or that any of the purported attorney errors identified by petitioner prejudiced his defense. See *United States* v. *Hodges*, 259 F.3d 655, 660 (7th Cir. 2001) ("An ineffective assistance of counsel claim cannot stand on a blank record, peppered with the defendant's own unsupported allegations of misconduct.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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