No. 98-2060

In the Supreme Court of the United States

RONALD D. EDWARDS, WARDEN,
Petitioner,

v.

ROBERT W. CARPENTER,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In our opening brief, we explained why procedural default analysis should apply to a Sixth Amendment ineffective-assistance-of-counsel claim when that claim is presented to a federal habeas court, not only for its own sake, but also as the "cause" for the default of another habeas claim. Nothing that respondent Carpenter has said in his brief diminishes the strength of our position. Indeed, Carpenter tries to avoid the question presented by arguing that the writ should be dismissed as improvidently granted. But his effort to deflect this Court from the question presented is unfounded. The question presented is properly before this Court and, resolving this question in our favor, the Court should reverse the judgment of the court of appeals and remand for further proceedings.

I. Respondent Offers No Sound Reason Why Procedural Default Analysis Should Not Apply.

Our opening brief (pages 20-25) showed the logic of our position, given propositions already established in *Murray v. Carrier*, 477 U.S. 478 (1986), and *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). Because the exhaustion requirement applies to a Sixth Amendment ineffectiveness claim asserted as cause for a procedural default (*Carrier*), and because the procedural default doctrine protects the integrity of the exhaustion requirement (*O'Sullivan*), it follows that the procedural default doctrine should also apply to an ineffectiveness claim asserted as cause for another procedural default.

Moreover, our opening brief (pages 27-28) also showed the good sense in this position. To exempt this Sixth Amendment claim from the procedural default doctrine, which applies uniformly to all other habeas claims, would create the anomalous result that a prisoner, with impunity,

could deliberately ignore a State's deadline for filing this kind of claim. Under the court of appeals' rule, now supported by Carpenter, an intentionally defaulting prisoner would be no worse off than a prisoner who complied with the deadline. This result certainly conflicts with the well-established respect that a federal habeas court must give to state-court deadlines.

A. The Relevant Precedents Support The State.

Respondent Carpenter mistakenly asserts that several of the cases cited in our opening brief support his position rather than ours.

1. *Carrier*. – In claiming that "*Carrier* stands for the proposition that a gateway claim may be asserted as cause for the procedural default of another merit claim even if the gateway claim is procedurally defaulted" (Resp. Br. at 37), Carpenter severely misstates the holding of that case. *Carrier* was a case in which a habeas petitioner asserted attorney error as the reason for failing to properly present a *Brady* claim on direct appeal. *See Brady v. Maryland*, 373 U.S. 83 (1963). The district court in *Carrier* ruled that, before asserting attorney error as cause for a procedural default on direct appeal, a prisoner must exhaust available state post-conviction proceedings for claiming ineffective assistance of counsel. *See* 477 U.S. at 483. The court of appeals in *Carrier* reversed, holding that attorney error need not be so egregious as to violate the Sixth Amendment in order to constitute cause for procedural default purposes, and that an attorney-error-as-cause claim need not be exhausted. *See id.* at 484. This Court, in turn, reversed, holding that the Fourth Circuit was wrong to think that attorney error can serve as cause without meeting the standard for establishing a Sixth Amendment violation. And the Court further observed

that, because only Sixth Amendment violations can serve as cause, a habeas petitioner must exhaust available state-court proceedings to redress a Sixth Amendment violation.

Contrary to Carpenter's suggestion (Resp. Br. at 37), the Court in *Carrier* did not evaluate a separate "non-constitutional [gateway] claim of 'attorney inadvertence'" to see if, on the facts, it was strong enough to establish cause for the procedural default of the *Brady* claim. Instead, in reviewing the court of appeals, this Court ruled categorically that attorney error may never serve as a "gateway claim" unless it can also stand on its own as a meritorious Sixth Amendment claim. In any event, even understood as a separate "non-constitutional gateway claim," this "non-constitutional" claim of attorney error was not "procedurally defaulted," as Carpenter asserts, simply because it was raised for the first time in the Fourth Circuit. The procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977), applies to claims not properly presented in *state court*, where the *state court* has refused to consider the merits of the claim because of the procedural default. By contrast, in *Carrier*, the whole issue of attorney error was raised for the first time in federal district court, but that fact alone did not make any ineffectiveness claim procedurally defaulted. On the contrary, the key point – as both the district court and this Court noted – was that a state-court remedy for a Sixth Amendment claim still appeared available, and thus the prisoner there was required to exhaust this remedy first.

Consequently, in no way can *Carrier* be said to stand for the proposition that a procedurally defaulted "gateway" claim may serve as cause for another procedural default where no cause has been shown for the default of the "gateway" claim itself. Simply put, *Carrier* did not involve a procedurally defaulted claim of ineffectiveness, and so

Carrier did not resolve the issue now before this Court. But, if anything, the logic of *Carrier* would suggest that the procedural default doctrine, like the exhaustion doctrine, should apply before a federal habeas court addresses whether a Sixth Amendment violation has occurred. There is no point in requiring exhaustion, as *Carrier* did, if that requirement can be satisfied simply by letting the clock run out on the state-court deadline.

2. *O'Sullivan.* – Insofar as Carpenter relies on *O'Sullivan*, that reliance is misplaced. As all nine Members of this Court agreed in *O'Sullivan*, the procedural default doctrine serves "'to protect the integrity' of the federal exhaustion rule," 526 U.S. at ___, 119 S. Ct. at 1734, quoting *id.* at 1736 (Stevens, J., dissenting), and does so by making sure that a prisoner "has *properly* exhausted [his state] remedies." *Id.* at 1734 (emphasis added). Otherwise, "a prisoner could evade the exhaustion requirement – and thereby undercut the values it serves – by 'letting the time run' on state remedies." *Id.*, quoting *id.* at 1737 (Stevens, J., dissenting). Thus, there should be unanimity here that the Sixth Circuit was wrong to hold that exhaustion alone (without any procedural default inquiry) applies when a Sixth Amendment claim is asserted as cause.

3. *Strickler.* – Likewise, *Strickler v. Greene*, 119 S. Ct. 1936 (1999), does not support Carpenter's position that a federal habeas court may ignore – without any showing of cause – the procedural default of a Sixth Amendment claim asserted as cause for another default. *Strickler* concerned a defaulted *Brady* claim, and this Court held that the cause of the default was the prosecution's very act of withholding evidence, along with other factors. In other words, as Carpenter says, the "cause arguments . . . were the same as the underlying facts of the *Brady* claim." Resp. Br. at 39.

Here, however, neither of Carpenter's two state-court defaults fits the *Strickler* model. First, the asserted cause for failing on direct appeal to contest the prosecution's method of presenting the factual basis for Carpenter's *Alford* plea is not that method of presentation itself, but instead appellate counsel's alleged incompetence in not attacking the validity of the plea. Second, the asserted cause for Carpenter's failure to present a Sixth Amendment claim in 1993, within 90 days of Rule 26(B)'s effective date, is not his appellate counsel's alleged incompetence in 1990 in failing to challenge the plea on direct appeal. In any event, whatever might be asserted as cause for Carpenter's untimely Rule 26(B) filing – an issue neither the district court nor court of appeals addressed – the key point is some such cause must be shown. On remand, Carpenter should be put to this test, and although we do not think that he could satisfy the test with a *Strickler*-like self-satisfying cause, an attempt of this sort would at least be responsive to the required inquiry.

Thus, *Strickler* simply confirms the necessity of establishing cause for a procedural default. Unlike the Sixth Circuit here, this Court in *Strickler* did not abandon that requirement. Holding that the same facts underlying a *Brady* claim may also serve as cause for the default of the *Brady* claim itself is not the same as holding the cause requirement unnecessary.

4. *LaGrand.* – Contrary to Carpenter's suggestion, we do not argue that *Stewart v. LaGrand*, 119 S. Ct. 1018 (1999) (*per curiam*), definitively resolves the question presented in this case. We do claim, however, that the Court's opinion displayed the right approach for how to resolve this question. Whether in dicta or as an alternative holding to support its judgment vacating the Ninth Circuit's

order in that case, this Court did say that an ineffective assistance claim "fails" to serve "as cause" for the "addition[al]" reason that "the ineffective assistance claim is, itself, procedurally defaulted." *Id.* at 1021.

B. This Court's "Actual Innocence" Cases Do Not Support Carpenter's Position.

Carpenter attempts to support his position using this Court's "actual innocence" cases. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Herrera v. Collins*, 506 U.S. 390 (1993). But those cases are inapposite. The "actual innocence" inquiry concerns an entirely separate exception to the procedural default doctrine from the "cause and prejudice" test – namely the "fundamental miscarriage of justice" alternative. *See Carrier*, 477 U.S. at 495-96. The same considerations of finality and federalism that underlie the cause-and-prejudice test simply do not apply when a prisoner can make the requisite showing of actual innocence. For this reason, a federal habeas court will reach the merits of a procedurally defaulted constitutional claim – even absent any showing of cause – in the "'extraordinary'" event that the prisoner can show actual innocence. *Schlup*, 513 U.S. at 321-22, quoting *Carrier*, 477 U.S. at 496.

But, in the absence of actual innocence, there is no similar imperative to review a defaulted claim, and the interests in finality and federalism remain paramount. When a prisoner asserts a second constitutional claim to justify his failure to raise an earlier constitutional claim, but the prisoner has also missed the state court's deadline for presenting this second claim, it is no "fundamental miscarriage of justice" to insist that the prisoner explain his failure to meet the second deadline as well as the first. The Court's actual innocence cases do not support the Sixth Circuit's decision in this case.

for this Court has never suggested that its "safety valve for the extraordinary case," *Schlup*, 513 U.S. at 333 (O'Connor, J., concurring) (internal quotation omitted), ought to apply to a very ordinary case like this one involving a missed state-court deadline for raising an ineffective-assistance claim.

If Carpenter himself could show actual innocence, a federal habeas court would reach the merits of his "illegal plea" claim (insofar as it is a federal claim about the particular procedures that Due Process requires for demonstrating the factual basis of an *Alford* plea). There would be no need to consider whether the failure of Carpenter's counsel to raise this "illegal plea" claim on direct appeal violated the Sixth Amendment. Because Carpenter cannot show actual innocence, however, he must establish that the performance of his appellate counsel was sufficiently egregious to violate the Sixth Amendment. But Carpenter had an opportunity to present this Sixth Amendment claim in state court. He missed that opportunity. There would be no "fundamental miscarriage of justice" in requiring him to explain why he did so, and nothing in *Schlup* or *Herrera* suggests that Ohio – having set a deadline by which state prisoners must bring an ineffective-assistance-of-appellate-counsel claim to the attention of state courts for review and correction there – is not entitled to expect federal courts to respect that deadline just as its own courts do.

If the States set and enforce rules for the timely assertion of either gateway or merit claims, the legitimate state interests that justify those rules in the first place – the States' interests in finality, in an early resolution of constitutional claims in the most appropriate forum, and their earnest desire to review and correct alleged constitutional violations themselves – are just as strong in either case, and federal courts do not honor those state rules by ignoring them

for gateway claims while enforcing them for merit claims. Carpenter's on-again, off-again approach to comity and federalism here is wrong, for it is "based on a conception of federal/state relations that undervalue[s] the importance of state procedural rules." *Coleman*, 501 U.S. at 750.

C. Uniform Application Of Procedural Default Analysis To All Ineffective Assistance Claims Will Not Add Costs Or Delay Litigation.

Carpenter contends that applying procedural default analysis to Sixth Amendment claims asserted as cause for other defaults will add costs or delays to the resolution of habeas cases. This contention is not true. Because *Carrier* requires an ineffectiveness claim to be meritorious as a freestanding Sixth Amendment claim in order to serve as cause for a default, any such claim alleged as cause for a default will be pleaded in a habeas petition as an independent habeas claim, as was Carpenter's Sixth Amendment claim here. J.A. 29.

Whenever a Sixth Amendment ineffectiveness claim pleaded in a habeas petition is procedurally defaulted, the federal habeas court already must ascertain whether there is cause for (and prejudice from) this default in order to address the merits of this claim as a freestanding basis for relief. *Coleman* so holds, as did the Sixth Circuit itself. Thus, it would not require the federal habeas court any more time or effort to apply the cause-and-prejudice inquiry to that Sixth Amendment claim when the prisoner offers it as cause for another default. In short, there is no basis for believing that it would impose any additional burdens on a federal habeas court to require the same procedural default analysis for the same Sixth Amendment claim, whether that claim functions in freestanding or gateway mode.

Moreover, contrary to Carpenter's suggestion (Resp. Br. at 45-46), the rule we urge the Court to adopt will generate no uncertainty in habeas law. We ask only that the principle of uniformity explicitly articulated in *Coleman* be recognized to govern a defaulted Sixth Amendment claim in its gateway as well as independent role. *See Coleman*, 501 U.S. at 750-51 ("uniformly" applying the cause-and-prejudice test to "all" procedurally defaulted claims presented for federal habeas review). Indeed, the specific holding we seek from this Court is even simpler and easier to understand and administer: the procedural default doctrine applies to all Sixth Amendment claims to which *Carrier* has already imposed the exhaustion requirement.

Far from "inject[ing] more doctrinal complexity" into habeas law (Resp. Br. at 46), confirming that both exhaustion and procedural default rules apply to Sixth Amendment claims asserted as cause would close an unnecessary and unfortunate loophole created by the Sixth Circuit. It is the Sixth Circuit's exception to the otherwise uniform application of procedural default analysis that is counter-intuitive, and, if upheld, would generate considerable uncertainty – as prisoners inevitably would attempt to expand or analogize this exception.

D. Carpenter's Rule Would Permit The "Deliberate Bypass" Of A State's Processes For Presenting Ineffectiveness Claims As Grounds For Reviving Claims Defaulted On Direct Appeal.

Carpenter states that we offer no reason to justify applying procedural default analysis to Sixth Amendment claims asserted as cause for another default. But the concern identified by all nine Justices in *O'Sullivan* is reason enough:

unless the procedural default doctrine applies to claims governed by the *Carrier* exhaustion requirement, prisoners will be able to render that exhaustion requirement meaningless by intentionally ignoring a State's deadline for presenting these claims. Not even the now-overruled "deliberate bypass" standard articulated in *Fay v. Noia*, 372 U.S. 391 (1963), would tolerate this result. Yet that result is what Carpenter's rule would permit.

Carpenter argues that exhaustion suffices to serve the State's interest at least in this case because Carpenter did present his Sixth Amendment claim to state court, and the state court could have invoked the "good cause" component of Rule 26(B) to reach the merits of that claim. This argument, however, is incorrect for at least two different reasons. First, it rests on a misunderstanding of Rule 26(B) itself. That Rule does not permit a state appellate court to pick whichever late ineffectiveness claims it wishes to address on the merits. Instead, like the cause component of this Court's own procedural default doctrine, the "good cause" provision of Rule 26(B) operates as a limited exception to an otherwise firm procedural bar. *See, e.g., State v. Winstead*, 74 Ohio St. 3d 277, 658 N.E.2d 722 (1996) (one-day delay in filing because of failure of overnight courier service is not "good cause"). Absent a "good cause" showing by the prisoner explaining his failure to meet the State's deadline, state courts will not and ought not review the merits of those late ineffective-assistance claims, just as they did not do so here.

Second, Carpenter's purported distinction between gateway and merits claims, for procedural default purposes, would apply even if there were no "good cause" exception to Ohio's 90-day deadline for filing an ineffective-assistance claim. According to Carpenter's position, then, a prisoner

could deliberately ignore an absolute 90-day deadline and still proceed in federal habeas to assert the ineffectiveness claim as cause for the first default on direct appeal. After all, the exhaustion requirement is satisfied when the clock has run on a fixed 90-day deadline. The federal habeas court could then overturn the result of the state-court direct appeal, *even though the State had its own procedure for considering whether to overturn the judgment, and even though the prisoner had deliberately bypassed this state procedure.*[1]

Furthermore, the affront to federalism is the same whether a State adopts an invariable deadline, with no exceptions whatsoever, or whether instead the State is willing to excuse a late filing in the exceptional circumstance that "good cause" is shown. When a state court holds that no "good cause" exists in a particular case, and yet the federal court may reach the claim as if the state-court procedural bar did not exist, the State has been undercut in its effort to channel this claim to the right place at the right time. Surely, federal habeas law should not penalize a State for adopting

[1] Perhaps concerned about this implication of its holding, the Sixth Circuit stated: "we do not decide whether a petitioner's complete failure to raise an ineffective assistance claim in the state courts would be insufficient under [*Carrier*]." J.A. 61. Insofar as this sentence suggests that the Sixth Circuit's holding might apply only when a state court will entertain a "good cause" showing for a missed deadline, that suggestion would lead to the anomalous – and unacceptable – consequence that a state-court procedural bar is exempt from the federal cause-and-prejudice test *only when a state court specifically has found no "good cause" for the missed deadline*. This result would seem exactly backwards: when a state court has already determined that a prisoner has no adequate justification for missing a deadline, the federal court especially should honor that determination, unless the prisoner can meet the federal standard of cause-and-prejudice.

its own "good cause" exception to one of its own filing deadlines. Federalism and comity require that a State be permitted to create a safety valve to its procedural bar without fear that a federal habeas court will no longer respect that bar.

Far from "precluding federal courts from acting at all" (Resp. Br. at 11), our position would permit consideration of a defaulted ineffectiveness claim – both as a gateway and for its own sake – if a prisoner can either justify the default of this claim or show actual innocence. Our position appropriately respects the relevant federal and state interests when a prisoner has no cause for missing a state-court deadline and cannot show actual innocence, whereas Carpenter's position does not. All of this Court's past precedents – and the Court's longstanding concerns for "finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum," *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) – suggest that Carpenter should first show cause and prejudice for his failure to comply with Rule 26(B) before citing ineffective-assistance as the cause for his default of another habeas claim.

II. The Question Presented Is Properly Before The Court.

Carpenter asserts for the first time in his merit brief that the question is not properly before the Court. This assertion is incorrect.

Carpenter argues that the issue of a procedural bar's "adequacy" is antecedent to the issue whether there is cause for noncompliance with the State's procedure. This argument, however, misses the key point. The Sixth Circuit held the whole framework of procedural default analysis

inapplicable to Sixth Amendment claims asserted as cause for other defaults: "Principles of comity do not require placing a procedural default analysis on claims asserted as cause." J.A. 61.

Holding procedural default analysis altogether inapplicable is analytically antecedent to the issue of "adequacy," which is a subsidiary inquiry *within the framework of procedural default analysis*. Indeed, this is precisely why the Sixth Circuit never reached the adequacy issue decided by the district court. The Sixth Circuit cut the "adequacy" inquiry off at the pass – finding the entire procedural default analysis irrelevant. *See* J.A. 65 n.13. It is this holding that we have brought to the Court for review, and the correctness of that holding is properly before the Court, without any need to consider the "adequacy" issue first.

Though Carpenter claims that there has been no finding of procedural default in this case, he does not dispute, nor could he, that both the Ohio Court of Appeals and the Ohio Supreme Court did not consider the merits of his Sixth Amendment claim, relying on the state-law ground that it was unjustifiably late.[2] That fact is sufficient to put the question presented before this Court. In considering this analytic point, it is useful to remember that the procedural default doctrine is a species of the "independent and adequate state ground" doctrine. *Coleman*, 501 U.S. at 729. A court obviously need not test the adequacy of a state ground if, as

[2] As the Sixth Circuit itself acknowledged: "True, the state court declined to rule on the merits of his ineffective assistance of appellate counsel claim because Carpenter filed the claim late, and according to the state court, without good cause for his delay." J.A. 60.

the Sixth Circuit held here, this entire doctrine does not apply at all in this particular context.

Indeed, Carpenter's claim that the holding of the Sixth Circuit is not ripe for review (without first addressing the adequacy of the state-court bar) is quite surprising, for Carpenter himself argued in the court of appeals that "the district court erred initially by determining that [his ineffective-assistance claim] must itself be subjected to a procedural default analysis before it may constitute cause." J.A. 58 (describing Carpenter's argument).[3] Having prevailed in contending that the applicability of procedural default analysis is analytically antecedent to the subsidiary issue of adequacy, Carpenter himself is now in no position to complain that this Court may not review the Sixth Circuit's holding because it did not first decide the adequacy issue. In any event, the important point is that the Sixth Circuit was right to consider *first* whether procedural default analysis applies at all, *before* considering any subsidiary issue (including adequacy) that is dependent on the answer to that *first* question. Although the Sixth Circuit answered this preliminary question incorrectly, the court of appeals was not wrong to start with it, and whether their answer should be affirmed or reversed is ripe for this Court's review.[4]

[3] In his Sixth Circuit brief, Carpenter argued that "the district court 'put the cart before the horse'" and that if his argument about the inapplicability of procedural default doctrine is correct "it will be unnecessary to reach the merits of the Warden's appeal [on the finding of inadequacy]." *See* Final Second Brief of Petitioner-Appellee/Cross-Appellant at p.18.

[4] Insofar as Carpenter objects to the particular phrasing of the question presented in our certiorari petition, we note that no such objection was raised in his brief in opposition, as required by this Court's Rule 15.2.

Contrary to Carpenter's suggestion, there is no jurisdictional or prudential barrier to a decision from this Court on the question whether or not procedural default analysis, like the exhaustion requirement, applies to Sixth Amendment claims asserted as cause. And for all the reasons that we have stated, the Sixth Circuit's holding conflicts with federal courts' otherwise uniform application of procedural default analysis and threatens the integrity of the exhaustion requirement adopted in *Carrier*. It is an aberration that has caught the well-deserved attention of 35 other States, each concerned that the court of appeals' errant approach not become binding on them. In short, the question presented is properly before the Court, it is an important one, and the Court should resolve it in this case.

III. This Court Should Either Remand Or Uphold The Adequacy Of The Procedural Bar.

If this Court reverses the judgment of the court of appeals, then the Court may remand the case for further proceedings, allowing the court of appeals to consider the "adequacy" of Ohio's Rule 26(B) as a procedural bar to Carpenter's ineffective-assistance claim. As the court of appeals explicitly acknowledged, it did not "reach the issue because of [its] ruling" on the question now before this Court. J.A. 65 n.13. Insofar as Carpenter asks this Court to reach the adequacy issue as an alternative ground, and if this Court does so, it should reject Carpenter's argument on the issue as untenable.

Ohio's Appellate Rule 26(B) provides that an ineffective-assistance-of-appellate-counsel claim "shall be filed . . . within ninety days . . . unless the applicant shows good cause for filing at a later time." Pet. Br. at 3. Once this Rule took effect on July 1, 1993, Carpenter was on notice

that he was obligated to file such a claim within 90 days, or else risk default of it. Arguably, he should have known even earlier that he risked default of this claim, for until Rule 26(B) took effect, prisoners wishing to raise ineffective-assistance-of-appellate-counsel claims in Ohio were required to do so within a 10-day deadline, absent "good cause" for filing later. *See State v. Murnahan*, 63 Ohio St. 3d 60, 66 & n.6, 584 N.E.2d 1204, 1209 & n. 6 (1992). In any event, by filing a Rule 26(B) application a full year after that Rule's 90-day deadline took effect, Carpenter clearly missed the State's deadline for raising his ineffective-assistance claim.

The Ohio Court of Appeals' holding that Carpenter had not shown "good cause" for his untimely filing makes perfect sense, for being present at his guilty plea hearing, he knew how the prosecution had presented its factual statement in support of the plea and thus should have known immediately whether his appellate lawyer acted contrary to his interests in failing to challenge that plea on direct appeal. J.A. 19-20. Carpenter *wanted* to plead guilty in 1990, making the choice to forgo a trial rather than face a possible death penalty. If he wanted to undo this choice, based on the procedures at his plea hearing, he should have said so by the end of his direct appeal or soon thereafter, as Ohio's rules required. Yet, as did the prisoner in *Alford*, Carpenter "now argues in effect that the State should not have allowed him this choice but should have insisted on proving him guilty of [capital] murder," *North Carolina v. Alford*, 400 U.S. 25, 38-39 (1970), and he brings that argument to federal court after having missed the State's deadline for raising it there first.[5]

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[5] *See also Mabry v. Johnson*, 467 U.S. 504, 508 (1984) ("It is well settled that a voluntary and intelligent plea of guilty made by an

The federal district court in this case held the state-court bar inadequate because, in its view, Ohio's intermediate appellate courts had been inconsistent in their interpretation of the Rule 26(B) "good cause" standard. J.A. 42-43. Yet that view would condemn the *Wainwright v. Sykes* "cause" standard itself, especially insofar it applies to bar defaulted claims by federal prisoners in section 2255 proceedings.[6] Under *Sykes* itself, the federal courts of appeals certainly have differed in their application of the "cause" standard to particular fact-patterns, and this Court does not always intervene immediately to resolve such circuit conflicts.[7] In fact, over twenty years after *Sykes*, the Court reiterated that it has "left open for resolution in future decisions the precise definition of cause and prejudice." *Dugger v. Adams*, 489 U.S. 401, 406-07 (1989) (internal quotations omitted). Surely, Ohio's 90-day deadline is not rendered inadequate just because it contains a measure of leniency that has

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accused person, who has been advised by competent counsel, may not be collaterally attacked.")

[6] *See United States v. Frady*, 456 U.S. 152, 167 (1982); *accord Bousley v. United States*, 523 U.S. 614 (1998) (applying this standard when, like Carpenter, a defendant challenged only his sentence and not his guilty plea).

[7] *See* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 1090-1108 (vol. 2) (3d ed. 1998), which describes various tensions among circuit courts in interpreting "cause," including (at 1095 n.28) a split among three 1989 cases involving the specific question whether a prisoner can establish cause for a defaulted *Brady* claim when the prisoner knew or reasonably could have learned of the undisclosed materials – a question this Court explicitly left unresolved last year in *Strickler* (*see* 119 S. Ct. at 1951 n.33). *See also* Liebman & Hertz, *supra*, at 1105-06 n.43 (describing decade-old, but post-*Carrier*, circuit conflict on when a prisoner's *pro se* status can constitute "cause" for a default).

generated some interpretive differences among the State's intermediate appellate courts.

Moreover, none of the cases cited by the district court support its holding of inadequacy. *Ford v. Georgia*, 498 U.S. 411 (1991), concerned the retroactive application of a judicial decision that could not have been reasonably anticipated, not a promulgated filing deadline adopted a year before its application to the case at hand. *See id.* at 419-24 (state-court rule for *Batson*, but not *Swain*, claims unforeseeable). *James v. Kentucky*, 466 U.S. 341 (1984), involved a rather arcane, unclear, and irregularly-followed state-law distinction between jury "instructions" and "admonitions," which made it exceedingly difficult for counsel in the midst of a fast-moving trial to know which "magic word" to use when asking the judge to tell the jury not to draw an adverse inference from the defendant's failure to testify. *See id.* at 349-51. By contrast, whatever imprecision exists in the phrase "good cause," that phrase is directed solely to the conduct of the *court* and not the Rule 26(B) *applicant*, and thus generates no uncertainty concerning the prisoner's obligation to file within 90 days, or else risk default.[8]

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[8] *Barr v. City of Columbia*, 378 U.S. 146 (1964), and *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964), are even further afield. In *Barr*, the Supreme Court of South Carolina refused to rule on two objections to sit-in convictions on the ground that the objections were "too general to be considered," although in four other cases within the same three-month (including one decided just the day before) the court ruled on the exact same objections. *See Barr*, 378 U.S. at 149-50. In *NAACP*, the Alabama Supreme Court refused to consider arguments raised in a brief because they were grouped together in five subparts for the convenience of the reader, although the court's rules and prior decisions gave no

Perhaps recognizing the weakness of the district court's finding of inadequacy, Carpenter offers the alternative observation that, between 1993 and 1996, a then-existing Ohio Supreme Court rule made it impossible to file a Rule 26(B) application while simultaneously pursuing review of a direct appeal in the Ohio Supreme Court. Yet Carpenter himself did not file for review of his convictions and sentence in the Ohio Supreme Court and never sought review of his ineffective-assistance claim until more than three years after losing his direct appeal, and more than one year after Rule 26(B)'s 90-day rule took effect. Nothing in the Ohio Supreme Court's rules prevented Carpenter from filing earlier, and so those rules do not render inadequate the state-court bar of Carpenter's untimely application.

Far from condemning this bar as inadequate, a federal habeas court should honor it as controlling. At bottom, this case is one in which a defendant pleaded guilty in order to avoid a possible death penalty if he went to trial. Yet more than three years after completion of his direct appeal, he raised the claim that his appellate lawyer should have challenged the validity of the plea on the ground that the prosecution should have established the factual basis for the plea through sworn testimony instead of the prosecution's own statement of the available evidence. When the state courts have found this claim too late for review in accordance with state procedures, the federal courts likewise should find the claim time-barred, unless the prisoner can meet the federal standard of cause-and-prejudice. As this Court has repeatedly observed, "'the concern with finality served by

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indication of prohibiting this stylistic practice. *See NAACP*, 377 U.S. at 293-301.

the limitation on collateral attack has special force with respect to convictions based on guilty pleas.'" *Bousley v. United States*, 118 S. Ct. 1604, 1610 (1998), quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979).[9]

CONCLUSION

For the reasons explained here and in our opening brief, the Court should reverse the judgment of the court of appeals and remand the case for further proceedings.

Respectfully submitted,

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[9] The merits of neither Carpenter's "illegal plea" claim nor his ineffective-assistance claim are before this Court. We note, however, that we do not accept Carpenter's assertions that these claims are meritorious and, if necessary, on remand would press our arguments on these points.