

No. 07-8561

In the
Supreme Court of the United States

BARRY ALBERT,

Petitioner,

v.

GENE M. JOHNSON,

in his official capacity as Director of the Virginia Department of Corrections,

Respondent.

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

**Brief in Opposition
to the Petition for a Writ of Certiorari**

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QUESTION PRESENTED

If an inmate wishes to appeal a district court’s “final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court,” the inmate must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). The Circuits are divided as to whether this requirement applies when an inmate’s habeas corpus petition involves a challenge to the execution of the sentence rather than the conviction. The question presented by the Petition is:

When a state prisoner’s habeas corpus petition challenges the execution of the sentence rather than the conviction, is the inmate required to obtain a certificate of appealability?

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**BRIEF IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI**

Virginia Attorney General Robert F. McDonnell, on behalf of Gene M. Johnson, in his official capacity as Director of Virginia Department of Corrections, and pursuant to this Court's request of February 20, 2008, submits this Brief in Opposition.¹

INTRODUCTION

Under the terms of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), there are two types of federal habeas corpus petitions. *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000). First, a § 2254 (state) or § 2255 (federal) petition allows an inmate to challenge his conviction. *See* 28 U.S.C. §§ 2254 and 2255. Second, a § 2241 petition allows inmates allows a prisoner to challenge how his sentence is being carried out. *See* 28 U.S.C. § 2241.

If an inmate wishes to appeal a district court's "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court," the inmate must obtain a certificate of appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A). However, the Circuits are divided as to whether this requirement applies when an inmate's habeas corpus petition challenges not the conviction, but the execution of the sentence. The Seventh and Ninth Circuits have held an inmate need not obtain a COA when challenging the execution of a

¹ On March 5, 2008, this Court extended the time for such filing to and including April 21, 2008.

sentence.² In sharp contrast, the Third, Fifth, Sixth, Tenth, Eleventh, and the District of Columbia Circuits have held that an inmate must obtain a COA.³

In the present matter, Albert challenges the execution of his sentence, not his conviction.⁴ Specifically, he disputes an administrative action that resulted in a diminishment of his ability to earn good time credit and, thus, a potentially longer sentence.⁵ The Fourth Circuit implicitly assumed, without deciding, that Albert had to obtain a COA and then determined that Albert had not met the standard for obtaining a COA. The practical effect, but not the explicit holding, of the lower court's decision is that an inmate who files a habeas corpus petition concerning the application of good time credits must obtain a COA.

Although there is a conflict among the Circuits, this Petition is a poor vehicle to resolve the conflict. Moreover, the practical effect of the decision below is correct. Certiorari should be denied.

² *White v. Lambert*, 370 F.3d 1002, 1010-13 (9th Cir. 2004); *Walker v. O'Brien*, 216 F.3d 626, 637-39 (7th Cir. 2000).

³ *See Medberry v. Crosby*, 351 F.3d 1049, 1063 (11th Cir. 2003); *Madley v. United States Parole Comm'n*, 278 F.3d 1306, 1310 (D.C. Cir. 2002); *Greene v. Tennessee Dep't of Corrs.*, 265 F.3d 369, 372 (6th Cir. 2001); *Coady v. Vaughn*, 251 F.3d 480, 486 (3rd Cir. 2001); *Montez*, 208 F.3d at 868; *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998). *See also Walker*, 216 F.3d at 642-45 (Easterbrook, J., joined by Posner, C.J. & Manion, J., dissenting from denial of rehearing en banc).

⁴ Although Albert characterizes his petition as a § 2254 petition, Pet. at 3, and although the district court treated it as a § 2254 petition, App. A. at 1, his challenge could be construed as a § 2241 petition. *See Montez*, 208 F.3d at 865-66.

⁵ The decision had no impact on the good time credits that Albert had previously earned. App. A. at 3.

STATEMENT OF THE CASE

1. Albert is an inmate incarcerated in the Virginia Department of Corrections. Prior to 2003, Albert was classified as a Level I prisoner – the highest level for accruing good time. Level I prisoners have greater opportunities to earn good time credits than inmates classified at lower accruing levels. Thus, Level I prisoners are more likely to be released early.

In April 2003, as part of the annual classification review done for all prisoners, department officials reclassified Albert from Level I to Level II. The basis for the reclassification was Albert's failure to maintain prison employment. As a result of this reclassification, Albert's ability to earn good time credits was diminished.

Albert requested review by the Warden and review was denied on April 13, 2003. App. A at 1-2. He also filed a formal grievance, which was denied on July 20, 2003. App. A at 2 n.1. Two years after his reclassification, in May 2005, Albert wrote a letter to the Virginia Department of Corrections protesting his reclassification. App. A at 2. The Department of Corrections again denied his request.

2. On November 15, 2005—more than two years after the denial of his grievance—Albert filed a habeas corpus petition in the Supreme Court of Virginia. In an unpublished order, that court *sua sponte* dismissed the petition as frivolous on January 18, 2006. *See Albert v. Director*, No. 052316 (Va. Jan. 18, 2006) (unpublished).

3. Following the denial of his petition by the state court, Albert filed a federal petition for habeas corpus in the U.S. District Court for the Eastern District of Virginia contending that his reclassification and resulting loss of good time credit violated the Constitution. The district court *sua sponte* dismissed the habeas petition, finding that none of the claims had merit. App. A. at 2-5.

4. Albert attempted to appeal to the United States Court of Appeals for the Fourth Circuit. In an unpublished per curiam order, the court of appeals concluded that Albert did not meet the standard for the issuance of a COA. App. D at 1-2. The Fourth Circuit did not address the issue of whether Albert was required to obtain a COA. Rather, the court of appeals implicitly assumed, without deciding, that he was required to obtain a COA and then concluded that “Albert has not made the requisite showing.” App. D at 2.

Albert petitioned for rehearing en banc and the lower court unanimously denied. App. G at 1. After obtaining an extension of time from the Chief Justice, App. H at 1, Albert filed his Petition for Certiorari.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for two reasons. First, although there is a conflict among the Circuits on the question of whether a COA is required, this Petition presents a poor vehicle for resolving the issue. Second, the practical effect of the decision below is correct.

I. THIS IS A POOR VEHICLE FOR RESOLVING THE CONFLICT.

Although there is conflict among the Circuits, this Petition is a poor vehicle for resolving the conflict. This is so for three reasons.

First, the habeas petition is barred by the statute of limitations. Because Albert is incarcerated by a State, there is a one-year statute of limitations on any habeas corpus petition. *See* 28 U.S.C. § 2244(d)(1).⁶ The statute of limitations runs from “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)(D). Albert was reclassified on April 1, 2003. App. A. at 1. He filed a grievance and the grievance was denied on July 20, 2003. Thus, his one-year to file a habeas corpus petition expired on July 20, 2004.⁷ Yet, Albert did not file a habeas corpus petition with the state courts until November 15, 2005—more than a year after the statute of limitations ran.⁸

⁶ The statute is tolled during the time that the inmate is presenting his habeas corpus petition to state courts. *See* 28 U.S.C. § 2244(d)(2).

⁷ This assumes that the statute of limitations is tolled while the inmate exhausts his administrative remedies. Although this Court has never addressed the issue, the Fourth Circuit has held that the statute of limitations is tolled while the inmate exhausts his administrative remedies. *See Wade v. Robinson*, 327 F.3d 328, 332-33 (4th Cir. 2003).

⁸ Albert may well argue that the statute of limitations was tolled by his May 2005 Letter to Department of Corrections. Such an argument should be rejected for two reasons. First, the one-year statute of limitations expired on July 20, 2004, which was before Albert ever sent his letter. Albert cannot revive his claim simply by sending a letter. Second, even if the statute of limitations had not expired, Albert’s letter is not part of the administrative remedies process and does not toll the statute of limitations.

Second, the lower court never addressed the question presented. It simply implicitly assumed—without deciding—that a COA was necessary and then determined whether Albert met the standard for obtaining a COA. *See* App. D at 1-2. If this Court is to resolve the question presented, it should do so in a case where the lower court explicitly addressed the issue. The Circuits have addressed the issue in some detail on numerous occasions.⁹ Undoubtedly, there will be other opportunities for this Court to resolve the issue.

Third, the question presented is irrelevant to the ultimate outcome of the habeas petition. Even if this Court granted review and determined that a COA was not required, Albert cannot prevail on the merits of his habeas petition. As the district court correctly determined, “it plainly appears from the face of the petition that [Albert] is not entitled to relief.” App. A. at 1.¹⁰

II. THE DECISION BELOW IS CORRECT.

Although the Fourth Circuit never expressly addressed the question presented, the practical effect of its decision—that a COA is required—is correct.

The question presented turns on the meaning of 28 U.S.C. § 2253(c)(1). That statute provides:

⁹ *See White*, 370 F.3d at 1010-13; *Medberry*, 351 F.3d at 1063; *Madley*, 278 F.3d at 1310; *Greene*, 265 F.3d at 372; *Coady*, 251 F.3d at 486; *Walker*, 216 F.3d at 637-39 (7th Cir. 2000); *Montez*, 208 F.3d at 868; *Stringer*, 161 F.3d at 262. *See also Walker*, 216 F.3d at 642-45 (Easterbrook, J., joined by Posner, C.J. & Manion, J., dissenting from denial of rehearing en banc).

¹⁰ Moreover, as the district court observed, some of Albert’s claims should be brought as 42 U.S.C. § 1983 claims rather than as habeas claims. App. A at 3 n.3.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

28 U.S.C. § 2253(c)(1). Unfortunately, “in a world of silk purses and pigs’ ears, [the federal habeas corpus statute] is not a silk purse of the art of statutory drafting.” *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Indeed, “it is possible, by viewing § 2253(c)(1)(A) in isolation, to nitpick its text and assume that [Albert] does not need a COA because his challenge runs not to the fact of detention but, instead, to the execution of his state sentence.” *Montez*, 208 F.3d at 868.¹¹ However, when § 2253(c)(1) is read in its entirety and in conjunction with other sections of the AEDPA, it is apparent that a COA is required “when the prisoner’s detention originated in state court process, even if a later decision [by an administrative board] is the more immediate cause of the prisoner’s continuing detention.” *Madley*, 278 F.3d at 1310.

The COA requirement varies depending upon whether the inmate is in federal or state custody. A federal prisoner must obtain a COA only when he is challenging “the final order in a proceeding under section 2255.” 28 U.S.C. § 2253(c)(1)(B). In other words, a federal inmate who is challenging his conviction

¹¹ See also 28 U.S.C. § 2253(c)(1)(A) (providing that a COA is necessary where “the detention complained of” arises out of process issued by a State court).

must obtain a COA, but a federal inmate who is only challenging the execution of his sentence need not obtain a COA. If a federal prisoner has filed a § 2241 proceeding challenging the execution of his sentence, then it is not necessary to obtain a COA.¹² Conversely, *state* prisoners must obtain a COA whenever “the detention complained of arises out of process issued by a State court” 28 U.S.C. § 2252(c)(1)(A). A COA is required for *both* a § 2254 proceeding and a § 2241 proceeding.¹³

This differing treatment of federal and state prisoners answers the question presented. “If Congress had intended to restrict the COA requirement to state prisoner petitions brought pursuant to § 2254, it would have employed exactly the same language that it chose with regard to federal prisoners in § 2253(c)(1)(B).” *Montez*, 208 F.3d at 868. By using broader language—“arises out of the process issued by a State court”—for state prisoners, Congress made it clear that state prisoners are treated differently than federal prisoners. *See Stringer*, 161 F.3d at 262. “If a state prisoner has been convicted in state court, is thereby incarcerated, and then files a § 2241 petition complaining about the condition or circumstances of that incarceration, then logic tells us that the person is detained because of a

¹² *Montez*, 208 F.3d at 867; *Stringer*, 161 F.3d at 262.

¹³ *Montez*, 208 F.3d at 867; *Stringer*, 161 F.3d at 262.

process issued (a conviction) by a State court.”¹⁴ *Greene*, 265 F.3d at 372. “[S]tate prisoners must obtain a COA whenever they are challenging any aspect of their detention; there is simply nothing in § 2253(c)(1)(A) limiting its COA requirements to challenges involving the fact of conviction.” *Montez*, 208 F.3d at 868 (citations omitted). Accordingly, Albert, like all state inmates, was required to obtain a COA. Therefore, the lower court decision is correct.

¹⁴ To be sure, there is some doubt as to whether state prisoners may even bring a § 2241 proceeding. *See White*, 370 F.3d at 1005-1010; *Coady*, 251 F.3d at 484-85 (both holding that state prisoners challenging the execution of their sentences must rely on § 2254). *But see Montez*, 208 F.3d at 865 (“Although the typical route is generally § 2254, a state prisoner may bring a habeas action under § 2241 or § 2254.”).

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be **DENIED.**

Respectfully submitted,

/s/ William E. Thro

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April 16, 2008

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CERTIFICATE OF SERVICE

On April 16, 2008, I served one copy of THE COMMONWEALTH OF VIRGINIA'S BRIEF IN OPPOSITION upon all parties required to be served, by United States Postal Service in accordance with Rule 29(3), as follows:

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