

The Unappealing State of Certificates of Appealability

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INTRODUCTION

The Supreme Court has stated that “the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.”¹ And in the past, “Congress has demonstrated its solicitude for the vigor of the Great Writ.”² But the passage of the Antiterrorism and Effective Death Penalty Act of 1996³ (AEDPA) nevertheless raised a series of significant procedural obstacles to habeas corpus relief. Among these obstacles, the certificate of appealability (COA) requirement has been a source of significant confusion and has engendered a number of circuit splits.⁴ This requirement dictates that a habeas petitioner must secure a COA specifying a substantial constitutional issue from a district or circuit court judge in order to appeal the denial of his habeas petition.⁵ In *Gonzalez v Thaler*,⁶ the Supreme Court resolved a significant COA-related circuit split over whether 28 USC § 2253(c)(3)’s requirement that the COA specify a substantial constitutional issue is jurisdictional. The Court held that while a COA itself is a jurisdictional prerequisite to appeal of the denial of a habeas petition, the other requirements contained in § 2253(c) are

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¹ *Bowen v Johnston*, 306 US 19, 26 (1939). See also *Johnson v Avery*, 393 US 483, 485 (1969).

² *Johnson*, 393 US at 485.

³ Pub L No 104-132, 110 Stat 1214, codified in various sections of Title 28.

⁴ See, for example, *Jennings v Stephens*, 2015 WL 159227, *9 (US) (“It is unclear whether [28 USC § 2253(c)] applies to a habeas petitioner seeking to cross-appeal in a case that is already before a court of appeals.”); *Gonzalez v Thaler*, 132 S Ct 641, 647 n 1 (2012) (noting the circuit split on whether a defective COA is a jurisdictional bar); *Williams v Quarterman*, 293 Fed Appx 298, 315 (5th Cir 2008) (referencing the circuit split concerning whether a COA is required to appeal a district court’s denial of a Rule 60(b) motion).

⁵ See 28 USC § 2253(c).

⁶ 132 S Ct 641 (2012).

“mandatory but nonjurisdictional.”⁷ This holding has bred further disagreement among the circuit courts with regard to the proper treatment of defective COAs, in part because the Court left unclear the definition of the term “mandatory” in the context of nonjurisdictional requirements.⁸ This Comment proposes a solution to this disagreement and gives meaning to the phrase “mandatory but nonjurisdictional.”

One common example of a defective COA is a COA specifying only a procedural issue, such as a question of equitable tolling. Such a COA is defective because it fails to specify a *constitutional* issue as required by § 2253(c). Currently, the circuit courts address such defective COAs in two primary ways. When presented with defective COAs, the Third and Sixth Circuits disregard the defects and proceed to the merits of the habeas appeal, even in the face of a government objection to the defect.⁹ In contrast, the Fifth and Eleventh Circuits tend to take some type of remedial measure when faced with defective COAs. Specifically, the Fifth Circuit vacates and remands defective COAs that are properly challenged, but does not raise COA defects *sua sponte*.¹⁰ The Eleventh Circuit takes enforcement of § 2253(c)(3) a step further by raising COA defects *sua sponte*, in addition to responding to government challenges.¹¹

This Comment begins with a description of the current appeals process under AEPDA and an examination of *Gonzalez* and its implications in Part I. Part II then considers the circuit case law interpreting *Gonzalez* and explores the ways that circuit courts have dealt with defective COAs. Part II also distinguishes between circumstances in which judicial consideration of a defective COA might raise concerns and circumstances in which such consideration, though technically improper, has no practical effect. In Part III, this Comment draws on analogies to other mandatory rules, the efficiency goals of the COA requirement, and the Court’s language in *Gonzalez* to recommend an intermediate approach to the treatment of defective

⁷ Id at 656.

⁸ See id at 651.

⁹ See *Sistrunk v Rozum*, 674 F3d 181, 186 (3d Cir 2012); *Keeling v Warden, Lebanon Correctional Institution*, 673 F3d 452, 457 (6th Cir 2012).

¹⁰ See *Jones v Stephens*, 541 Fed Appx 399, 410 (5th Cir 2013).

¹¹ See *Spencer v United States*, 773 F3d 1132, 1137–38 (11th Cir 2014) (addressing the defective COA issue even though *both* parties asked the court not to vacate the defective COA, and announcing a strict prospective rule of vacatur and remand in the event of a defective COA); *Dauphin v United States*, 2015 WL 1137154, *2 (11th Cir).

COAs. This intermediate approach balances the Third Circuit’s effective disregard for the § 2253(c) requirements with the Eleventh Circuit’s strict adherence to the text of the statute. In doing so, it brings treatment of § 2253(c)(3) into line with the treatment of other mandatory rules. Concretely, the intermediate approach provides that when a party properly challenges a defect, the reviewing court should have no discretion to disregard the challenge, but objections to defects should be waivable and forfeitable. This approach additionally precludes courts from reviewing COAs sua sponte.

I. HABEAS CORPUS, AEDPA, AND THE APPEALS PROCESS

This Part begins by briefly introducing the concept of habeas corpus and the passage of AEDPA in Part I.A. It then describes the system of appeals under AEDPA in Part I.B, noting the current statutory requirements as well as the origins and goals of the COA requirement. Next, Part I.C examines the circuit split that developed prior to *Gonzalez* regarding whether § 2253(c)(3)—which requires that a COA “indicate” the substantial constitutional issue required in § 2253(c)(2)—is a jurisdictional requirement.¹² Finally, Part I.D provides a close reading of the Supreme Court’s treatment of the circuit split in *Gonzalez*.

A. Federal Habeas Corpus and AEDPA

An inmate may seek the writ of habeas corpus when he believes that he is being held “in violation of the Constitution or laws or treaties of the United States.”¹³ In the Judiciary Act of 1789,¹⁴ Congress expressly granted federal courts the power to issue the writ of habeas corpus to federal prisoners.¹⁵ The Judiciary Act did not specify the substantive scope of the writ, and courts adhered to common-law practice, which permitted habeas relief after conviction only when the convicting court lacked jurisdiction.¹⁶ In the Habeas Corpus Act of 1867,¹⁷ the power to grant the writ was extended to include state prisoners.¹⁸ The

¹² 28 USC § 2253(c)(3).

¹³ 28 USC § 2241(c)(3).

¹⁴ 1 Stat 73.

¹⁵ Judiciary Act of 1789, 1 Stat at 81–82.

¹⁶ See *Stone v Powell*, 428 US 465, 475 (1976). For an example of a case applying a strict jurisdictional approach, see *Ex Parte Watkins*, 28 US (3 Pet) 193, 202–03 (1830).

¹⁷ Act of Feb 5, 1867 (“Habeas Corpus Act of 1867”), 14 Stat 385.

¹⁸ Habeas Corpus Act of 1867, ch 28, § 1, 14 Stat at 385.

Habeas Corpus Act of 1867 also expanded the writ in a variety of other ways.¹⁹ Most notably, it defined the scope of the writ, giving courts the power to “grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”²⁰ Despite this new definition, courts continued to impose a jurisdictional limitation on federal habeas.²¹ Over time, however, the Supreme Court both stretched the concept of “jurisdiction” and relaxed the jurisdictional limitation in order to expand the reach of the writ.²² Finally, in the 1942 decision *Waley v Johnston*,²³ the Court expressly abandoned the jurisdictional limitation.²⁴ The Supreme Court continued to expand the availability of the writ—particularly under Chief Justice Earl Warren²⁵—up until the 1970s, at which point the Court pulled back from earlier expansions and established significant limitations on the writ.²⁶

¹⁹ See Lee Kovarsky, *Original Habeas Redux*, 97 Va L Rev 61, 72 (2011).

²⁰ Habeas Corpus Act of 1867, ch 28, § 1, 14 Stat at 385.

²¹ See *Powell*, 428 US at 475.

²² See generally, for example, *Frank v Mangum*, 237 US 309 (1915). In *Frank*, which involved a mob-dominated trial, the Court suggested the possibility that a court’s jurisdiction might be “lost in the course of the proceedings” due to “the conditions that surrounded the trial.” *Id.* at 327. The Court ultimately rejected this lost-jurisdiction argument in *Frank* because the state appellate court found that the allegations of mob violence were unfounded. The Court did, however, apply this notion of lost jurisdiction in *Moore v Dempsey*, 261 US 86 (1923), which reversed a denial of the petition in the context of a mob-dominated trial. *Id.* at 88–92. See also, for example, *Johnson v Zerbst*, 304 US 458, 467 (1938) (describing compliance with the Sixth Amendment right to assistance of counsel as an “essential jurisdictional prerequisite” to a court’s authority to enter judgment in a criminal case).

²³ 316 US 101 (1942).

²⁴ *Id.* at 104–05 (“[T]he use of the writ in the federal courts . . . is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it.”).

²⁵ See, for example, *Fay v Noia*, 372 US 391, 435–38 (1963) (holding that “the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings”); *Townsend v Sain*, 372 US 293, 312–13 (1963) (requiring a federal habeas court to provide an evidentiary hearing “if the habeas applicant did not receive a full and fair evidentiary hearing in a state court”); *Sanders v United States*, 373 US 1, 15–19 (1963) (outlining the broad circumstances in which a federal court must fully consider the merits of a habeas applicant’s successive writ application even if his prior application was denied). See also Brian R. Means, *Postconviction Remedies* § 4:5 at 79 (West 2014) (summarizing the Warren Court’s expansion of the availability of the writ to state prisoners).

²⁶ See, for example, *Wainwright v Sykes*, 433 US 72, 87–88 (1977) (overruling *Noia* in part); *Teague v Lane*, 489 US 288, 316 (1989) (rejecting the use of habeas corpus “as a vehicle to create new constitutional rules of criminal procedure”). See also Means, *Postconviction Remedies* § 4:5 at 79–81 (cited in note 25) (describing the Burger Court’s “retrenchment of federal habeas corpus rights established in the 1960s”).

These limitations on habeas relief were significantly multiplied by Congress's passage of AEDPA in the wake of the Oklahoma City bombing.²⁷ AEDPA serves as the statutory framework that governs the writ of habeas corpus. The statute places a number of restrictions on the availability of habeas corpus relief, including significant "restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."²⁸ As a practical matter, habeas corpus relief is incredibly rare, particularly in noncapital cases,²⁹ despite the fact that habeas petitions occupy almost 7 percent of the federal docket.³⁰ AEDPA in particular is characterized by its extensive procedural obstacles to relief,³¹ and more than half of all noncapital petitions are dismissed without consideration of the merits.³² For those rare petitions that *are* successful, the relief granted in noncapital cases often consists of a court order instructing the state to grant the petitioner a new trial or a new sentencing hearing within a certain period of time.³³ Similarly, for successful capital petitions, the reviewing court normally orders the state to either grant the petitioner a new sentencing hearing within a certain period of time or commute the petitioner's death sentence.³⁴

²⁷ See *Conference Report on S. 735, Antiterrorism and Effective Death Penalty Act of 1996*, 104th Cong, 2d Sess, in 142 Cong Rec H 3614 (daily ed Apr 18, 1996) (statement of Rep Pelosi) (describing the Oklahoma City bombing as the "driving force behind the renewed push for anti-terrorism legislation").

²⁸ *Miller-El v Cockrell*, 537 US 322, 337 (2003).

²⁹ See Nancy J. King, Fred L. Cheesman II, and Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts; An Empirical Study of Habeas Corpus Cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996* *51–52 & nn 87, 89 (NCJRS, Aug 21, 2007), archived at <http://perma.cc/D5V2-ZB6F> (finding a grant rate of 13 percent in capital habeas cases but of only 0.34 percent in noncapital habeas cases). See also Nancy J. King, *Non-capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 Fed Sent Rptr 308, 310 (2012) (observing that, after both district and circuit court review, habeas relief was granted in only 0.8 percent of noncapital habeas cases).

³⁰ See Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U Chi L Rev 519, 520–21 (2014) (noting that 6.77 percent of cases filed in the district courts in 2012 sought noncapital postconviction relief).

³¹ See *id.* at 532–34. These procedural obstacles include a one-year statute of limitations, a bar on second-and-successive petitions, and an exhaustion requirement. 28 USC §§ 2244(d), 2244(b), 2254(b).

³² See King, Cheesman, and Ostrom, *Final Technical Report* at *45 (cited in note 29) (stating that only 42 percent of noncapital petitions terminated other than by transfer or grant had at least one claim denied on the merits).

³³ See, for example, King, 24 Fed Sent Rptr at 311–15 (cited in note 29).

³⁴ See, for example, *Jennings v Stephens*, 2015 WL 159277, *5 (US), quoting *Jennings v Thaler*, 2012 WL 1440387, *7 (SD Tex) ("The District Court's opinion . . .

The Supreme Court has commented on the purpose and legislative intent of AEDPA in a variety of cases, emphasizing that the statute seeks to “eliminate delays in the federal habeas review process”³⁵ and “further the principles of comity, finality, and federalism.”³⁶ The Joint Explanatory Statement explicitly states that AEDPA is designed “to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.”³⁷ But scholars have questioned the clarity and value of AEDPA’s legislative history, asserting that “[e]fforts to explain habeas jurisprudence in light of a single congressional intent [] are futile.”³⁸ Furthermore, the statute “has been a lightning rod for harsh scholarly and judicial criticism,”³⁹ and its “poor drafting is legendary.”⁴⁰ Indeed, in places, “the statutory text is so ambiguous, and so generative of circuit splits, that it might as well have been drafted as a delegation to the Court.”⁴¹ In light of these shortcomings, any critical analysis drawing on statutory text and purpose must be approached with a significant measure of

commanded the State to ‘release Jennings from custody unless, within 120 days, the State of Texas grant[ed] Jennings a new sentencing hearing.’”)

³⁵ *Holland v Florida*, 560 US 631, 648 (2010).

³⁶ *Williams v Taylor*, 529 US 420, 436 (2000).

³⁷ *Joint Explanatory Statement of the Committee of Conference*, 104th Cong., 2d Sess., in 142 Cong Rec H 7462 (daily ed Apr 15, 1996) (“Joint Explanatory Statement”).

³⁸ Huq, 81 U Chi L Rev at 530–31 n 41 (cited in note 30). For an extensive discussion of AEDPA’s ambiguous legislative history, public-choice concerns, and the futility of an interpretive reliance on AEDPA’s purported purposes, see generally Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 Tulane L Rev 443 (2007).

³⁹ Jonah J. Horwitz, *Certifiable: Certificates of Appealability, Habeas Corpus, and the Perils of Self-Judging*, 17 Roger Williams U L Rev 695, 737 (2012). See also Christopher Q. Cutler, *Friendly Habeas Reform—Reconsidering a District Court’s Threshold Role in the Appellate Habeas Process*, 43 Willamette L Rev 281, 301 (2007) (“Congress’ drafting of the AEDPA created anything but a model of clarity. . . . Courts and commentators have lambasted the AEDPA’s poorly chosen language, unclear mandates, and contradictory provisions.”); *United States v Burch*, 202 F3d 1274, 1277 (10th Cir 2000) (“We recognize and agree that the AEDPA is not exactly a model of careful statutory drafting.”); *Houchin v Zavaras*, 924 F Supp 115, 117 (D Colo 1996) (“Not only is there a lack of clear direction in the Act, the confusion is heightened by the mandates actually articulated.”).

⁴⁰ Kovarsky, 97 Va L Rev at 80 (cited in note 19). See also Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 NYU L Rev 699, 705 (2002) (“AEDPA is replete with ambiguities and apparent inconsistencies. These are quite obviously the products of the haste with which the statute was drafted.”); *Lindh v Murphy*, 521 US 320, 336 (1997) (“All we can say [about AEDPA] is that in a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.”).

⁴¹ Huq, 81 U Chi L Rev at 531 (cited in note 30).

caution, and it should be noted that the writ is, in large part, a product of “judicial rather than congressional control.”⁴²

B. Appealing the Denial of a Habeas Petition

As noted above, the vast majority of habeas petitions are denied at the district court level. One study estimated a grant rate of only 0.34 percent for noncapital habeas cases.⁴³ In other words, over 99 percent of noncapital habeas petitions are denied. Individuals petitioning for habeas corpus have no constitutional right to appeal a denial of habeas relief.⁴⁴ Rather, under AEDPA, the petitioner must obtain a COA in order to appeal the denial.⁴⁵ In *Miller-El v Cockrell*,⁴⁶ the Supreme Court held that obtaining a COA is “a jurisdictional prerequisite” to appeal.⁴⁷ To obtain a COA, the inmate must make a request to a district or circuit court judge.⁴⁸ In the application, the inmate includes the issues he wishes to raise on appeal. In general, the application process is informal, there is no hearing, and the government rarely files a brief in response to the prisoner’s request.⁴⁹ The determination is simply made in chambers. If the district court judge denies the request, the inmate may apply to the circuit judge.⁵⁰ In addition, a notice of appeal to the circuit court can be treated as a request for a COA.⁵¹ However, 92 percent of all COA rulings are denials.⁵² Further, unlike the petitioner, the state is not required

⁴² Id at 530.

⁴³ See King, Cheesman, and Ostrom, *Final Technical Report* at *52 & n 89 (cited in note 29).

⁴⁴ See *Miller-El*, 537 US at 335 (“[A] state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court’s denial of his petition.”).

⁴⁵ 28 USC § 2253(c). See also *Miller-El*, 537 US at 335–36.

⁴⁶ 537 US 322 (2003).

⁴⁷ Id at 336. Because obtaining a COA is a jurisdictional requirement, courts can never entertain an appeal when no COA has been obtained, and they must raise the failure to obtain a COA sua sponte. See *Gonzalez*, 132 S Ct at 648.

⁴⁸ See 28 USC § 2253(c)(1). Note that although the text of the statute refers to issuance by “a circuit justice or judge,” courts have universally interpreted this to mean that a district court or circuit court judge can issue the writ. *Gonzalez*, 132 S Ct at 649 n 5. This understanding of the statute is made explicit in Federal Rule of Appellate Procedure (FRAP) 22(b)(1) (“[T]he applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability.”) (emphasis added).

⁴⁹ Consider Third Circuit Local Appellate Rule 22.1 (“The appellees may, but need not unless directed by the court, file a memorandum in opposition to the granting of a certificate [of appealability].”).

⁵⁰ See FRAP 22(b)(1).

⁵¹ See FRAP 22(b)(2).

⁵² See King, 24 Fed Sent Rptr at 308 (cited in note 29).

to seek a COA in order to appeal.⁵³ The Supreme Court may review circuit court denials of COA requests on writ of certiorari.⁵⁴

The COA requirement in AEDPA is derived from the pre-AEDPA certificate of probable cause (CPC) requirement. Congress first enacted legislation requiring this “threshold prerequisite to appealability” in 1908.⁵⁵ This was largely due to concerns that inmates facing capital sentences were filing frivolous habeas corpus petitions to delay execution.⁵⁶ The CPC requirement was therefore considered the “primary means of separating meritorious from frivolous appeals.”⁵⁷ Because the statute requiring a CPC did not specify the standard for issuance of the certificate, the Supreme Court in *Barefoot v Estelle*⁵⁸ filled the gap by holding that to obtain a CPC, a petitioner must make a “substantial showing of the denial of [a] federal right.”⁵⁹ In a footnote, the Court explained that a “substantial showing” requires that the petitioner “demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.”⁶⁰

When Congress enacted AEDPA, it replaced the CPC requirement with the closely related COA provision. Although the legislative history of AEDPA includes no commentary about the COA provision, the Supreme Court has stated that “Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not.”⁶¹ Section 2253 provides the current statutory framework for appeals seeking federal habeas relief, beginning with a general grant of jurisdiction in § 2253(a).⁶² The subsequent sections narrow and define that jurisdiction. Subsection (c)(1) states that “[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus

⁵³ See FRAP 22(b)(3).

⁵⁴ See *Hohn v United States*, 524 US 236, 253 (1998).

⁵⁵ *Miller-El*, 537 US at 337.

⁵⁶ See *id.* See also Horwitz, 17 Roger Williams U L Rev at 702 (cited in note 39) (noting Congress’s “worry that prisoners were deliberately abusing their rights of appeal to stay executions”).

⁵⁷ *Barefoot v Estelle*, 463 US 880, 892–93 (1983).

⁵⁸ 463 US 880 (1983).

⁵⁹ *Id.* at 893 (quotation marks omitted).

⁶⁰ *Id.* at 893 n 4 (quotation marks and citations omitted).

⁶¹ *Miller-El*, 537 US at 337.

⁶² 28 USC § 2253(a).

proceeding.”⁶³ Next, subsection (c)(2) specifies that “[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.”⁶⁴ This provision adopts the standard set forth by the Supreme Court in *Barefoot* but requires that the petitioner show the denial of a constitutional, rather than a federal, right.⁶⁵ In light of the similarity between the CPC and COA requirements, the Court extended the *Barefoot* standard to COAs in *Slack v McDaniel*,⁶⁶ holding that the COA’s “substantial showing” requirement “includes showing 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.”⁶⁷ *Slack* permits the issuance of a COA not only when the district court has rejected a substantial, debatable constitutional claim but also when the district court has rejected the petition on a substantial, debatable procedural ground, so long as the petitioner can also show an underlying debatable constitutional issue.⁶⁸ Finally, subsection (c)(3) provides that a COA “shall indicate which specific issue or issues satisfy the showing required by paragraph (2).”⁶⁹ In other words, the COA must specify a substantial, debatable constitutional issue. This Comment focuses primarily on the (c)(3) requirement, although subsections (c)(2) and (c)(3) are necessarily interdependent.

Together, § 2253(c) and *Slack* indicate that there are various ways in which a COA may be defective. First, a COA is improper under § 2253(c)(2) if no reasonable jurist could debate whether the petition should have been resolved in a different manner—that is, if the constitutional issue is not “substantial.”⁷⁰ Second, a COA is defective under § 2253(c)(3) if it fails to specify a constitutional issue—either because it specifies only a

⁶³ 28 USC § 2253(c)(1).

⁶⁴ 28 USC § 2253(c)(2).

⁶⁵ This shift from federal rights to constitutional rights narrows the universe of claims that may be appealed and essentially precludes appeal of federal statutory claims and federal treaty claims. See, for example, *Slack v McDaniel*, 529 US 473, 483 (2000). (“[W]e give the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word ‘constitutional.’”).

⁶⁶ 529 US 473 (2000).

⁶⁷ *Id.* at 483–84 (quotation marks omitted).

⁶⁸ *Id.* at 484.

⁶⁹ 28 USC § 2253(c)(3).

⁷⁰ 28 USC § 2253(c)(2).

procedural issue,⁷¹ specifies only a federal statutory claim,⁷² or fails to specify *any* issue.⁷³ Third, a COA is improperly granted if a substantial constitutional question exists and the COA is granted on that issue, but the district court has dismissed the petition on procedural grounds that no reasonable jurist would find debatable.⁷⁴

C. Interpreting § 2253(c): The Pre-*Gonzalez* Circuit Split

While *Miller-El* made clear that the COA requirement in § 2253(c)(1) is a jurisdictional prerequisite to appeal,⁷⁵ and *Slack* clarified the substantial-showing requirement,⁷⁶ § 2253 continued to be a source of significant confusion among the federal circuit courts. In particular, a circuit split developed regarding whether the other requirements of § 2253(c) are also jurisdictional.⁷⁷ The Third Circuit concluded that the proper issuance of a COA was a jurisdictional requirement and that the appellate court was therefore obligated to review the issuance.⁷⁸ In contrast, a majority of circuits concluded that a defective COA did not pose a jurisdictional bar to appeal.⁷⁹ Therefore, the majority of courts generally proceeded to the merits even when presented

⁷¹ See, for example, *Gonzalez*, 132 S Ct at 648 (identifying the COA as defective because “the Court of Appeals judge . . . identified a debatable procedural ruling, but did not indicate the issue on which Gonzalez had made a substantial showing of the denial of a constitutional right”) (quotation marks omitted).

⁷² See, for example, *United States v Christensen*, 456 F3d 1205, 1206 (10th Cir 2006) (denying a COA for a sentencing claim under *Shepard v United States*, 544 US 13 (2005), because *Shepard* “decided only a matter of statutory interpretation” rather than a constitutional issue).

⁷³ See, for example, *Keeling v Warden, Lebanon Correctional Institution*, 673 F3d 452, 457 (6th Cir 2012).

⁷⁴ See, for example, *West v United States*, 579 Fed Appx 863, 866 (11th Cir 2014) (determining that “a COA should not issue” if there is no debatable question regarding a procedural ruling).

⁷⁵ *Miller-El*, 537 US at 335–36.

⁷⁶ *Slack*, 529 US at 483–84.

⁷⁷ For an extensive discussion of the pre-*Gonzalez* circuit split, see generally Ryan Hagglund, Comment, *Review and Vacatur of Certificates of Appealability Issued after the Denial of Habeas Corpus Petitions*, 72 U Chi L Rev 989 (2005).

⁷⁸ See *United States v Cepero*, 224 F3d 256, 259–62 (3d Cir 2000) (en banc).

⁷⁹ See, for example, *Soto v United States*, 185 F3d 48, 52–53 (2d Cir 1999); *Porterfield v Bell*, 258 F3d 484, 485 (6th Cir 2001) (explaining that although a defective COA is not a jurisdictional bar to appeal “[u]nder normal circumstances,” vacatur and remand to the district court to correct the defect was appropriate in this particular case); *Young v United States*, 124 F3d 794, 799 (7th Cir 1997); *Tiedeman v Benson*, 122 F3d 518, 522 (8th Cir 1997) (treating a defective COA as if no COA had been issued at all, and thus treating the notice of appeal as an application for a COA); *Phelps v Alameda*, 366 F3d 722, 726 (9th Cir 2004); *United States v Talk*, 158 F3d 1064, 1068 (10th Cir 1998).

with defective COAs, and they declined to raise defects *sua sponte*.⁸⁰ Although the Supreme Court resolved this circuit split in *Gonzalez* by holding that the other requirements of § 2253(c) are nonjurisdictional,⁸¹ the circuit courts' pre-*Gonzalez* approaches illustrate two competing concerns related to the treatment of defective COAs: efficient disposition of habeas cases and the proper administration of § 2253(c).⁸²

Efficiency considerations motivated the majority of courts in the pre-*Gonzalez* circuit split to conclude that the § 2253(c)(2) and (c)(3) requirements were nonjurisdictional. These courts recognized the COA's usefulness as a "screening device, helping to conserve judicial (and prosecutorial) resources."⁸³ But as the Second Circuit noted, "dismissing an appeal after a certificate of appealability has already issued would be of little utility; installing this Court as a gate keeper for the gate keeper would be redundant."⁸⁴ Many circuits looked to briefing as a benchmark for resource expenditure and drew distinctions between those challenges raised early in the process and those raised after briefing.⁸⁵ For example, the Seventh Circuit explained that after a COA has been issued, "the case proceeds to briefing and decision"; thus, "the resources have been invested," and "there is little point in scrutinizing the certificate of appealability."⁸⁶ On the other hand, when "briefing has not yet begun . . . it may make a

⁸⁰ See, for example, *Talk*, 158 F3d at 1068.

⁸¹ *Gonzalez*, 132 S Ct at 649.

⁸² These competing concerns have emerged with regard to other aspects of AEDPA as well. Contrast *Panetti v Quarterman*, 551 US 930, 946 (2007) (majority) (resisting a statutory interpretation of § 2244's bar on successive petitions that would "not conserve judicial resources"), with *id* at 968 (Thomas dissenting) ("[J]udicial economy considerations cannot override AEDPA's plain meaning.").

⁸³ *Young*, 124 F3d at 799.

⁸⁴ *Soto*, 185 F3d at 52. See also *Lozada v United States*, 107 F3d 1011, 1015 (2d Cir 1997) (referring to the review of COAs as a "gate-keeping function") (quotation marks omitted).

⁸⁵ For a critique of this reliance on briefing as a benchmark, see Hagglund, Comment, 72 U Chi L Rev at 1018–21 (cited in note 77).

⁸⁶ *Young*, 124 F3d at 799. See also *Buie v McAdory*, 322 F3d 980, 982 (7th Cir 2003); *Davis v Borgen*, 349 F3d 1027, 1028 (7th Cir 2003) ("Only when the motion to vacate is made early enough to produce savings for the litigants . . . does it make sense to entertain a motion to vacate a certificate.") (citation omitted); *Tiedeman*, 122 F3d at 522 (emphasizing that when the case has been briefed, the court has heard oral argument, and the court knows what "the result ought to be," there is no reason to remand); *Porterfield*, 258 F3d at 485 ("Under normal circumstances, considerations of judicial economy will discourage review of [COAs].").

good deal of sense to consider a challenge to a COA.”⁸⁷ In light of these efficiency considerations, jurisdictional treatment of the § 2253(c)(2) and (c)(3) COA requirements was particularly unattractive, as this construction would require sua sponte review of each COA. This “would increase the complexity of appeals in collateral attacks and the judicial effort required to resolve them, [which is] the opposite of the legislative plan.”⁸⁸

Some of these courts nevertheless recognized that a competing concern—“the proper administration of § 2253(c)” —counseled in favor of vacating defective COAs regardless of efficiency concerns.⁸⁹ The Ninth Circuit therefore explained that when “the issuance of a COA [is] so far off the mark that the certificate is simply invalid on its face,” vacatur “may be appropriate regardless of the investment of time and energy into the case.”⁹⁰ The Eleventh Circuit went a step further in prioritizing adherence to the statute: “[t]o be faithful to the amended version of section 2253(c),” the court consistently vacated and remanded cases to the district court when a COA was improvidently granted.⁹¹ The circuits’ pre-*Gonzalez* approaches illustrate the tension between sensitivity to the efficiency considerations underlying the COA requirement and fidelity to the text of the statute. This tension was also apparent in the *Gonzalez* decision, and it persists in the circuit courts’ current treatment of defective COAs.

D. *Gonzalez v Thaler*

In *Gonzalez*, the Court took up the question whether a defective COA poses a jurisdictional bar to circuit courts’ authority to decide the merits of an appeal. In this case, although the district court had denied the petitioner’s COA request, a circuit

⁸⁷ *Phelps*, 366 F3d at 728 (quotation marks omitted). See also *Tiedeman*, 122 F3d at 522 (distinguishing the present case from other cases in which “it might make sense” to remand to the district court to correct the defective COA, on the grounds that the present case was fully briefed).

⁸⁸ *Young*, 124 F3d at 799.

⁸⁹ *Phelps*, 366 F3d at 728.

⁹⁰ *Id.*

⁹¹ *Peoples v Haley*, 227 F3d 1342, 1347 (11th Cir 2000) (vacating and remanding for specification of issues). See also *Bell v Florida Attorney General*, 614 F3d 1230, 1232 (11th Cir 2010) (vacating a COA as improvidently granted without prejudice); *Hunter v United States*, 101 F3d 1565, 1584 (11th Cir 1996) (remanding but not vacating a COA that did not specify a constitutional issue for appeal).

judge granted a COA on a question of timeliness.⁹² The court of appeals affirmed the district court's denial of the habeas petition without discussing the fact that the COA had been improperly issued because it failed to include a constitutional question.⁹³ When the habeas petitioner sought a writ of certiorari, the state argued for the first time that the defective COA posed a jurisdictional bar to appeal.⁹⁴ The state conceded, and the Court agreed, that § 2253(c)(2), which requires that the petitioner make a "substantial showing of the denial of a constitutional right," is nonjurisdictional.⁹⁵ The state nevertheless argued that § 2253(c)(3), which requires that the judge "indicate" the constitutional issue in the COA, is jurisdictional.⁹⁶ The Court rejected this argument and held that § 2253(c)(3) was mandatory but nonjurisdictional.⁹⁷

The Court based its conclusion primarily on the structure and language of AEDPA, applying the "clear statement" principle that a rule should be treated as jurisdictional only if the legislature "clearly states" that it is jurisdictional.⁹⁸ In addition to this question of statutory interpretation, the Court considered two key policy issues: fairness to the petitioner and the presumed efficiency goals of the statute.⁹⁹ Through these two considerations, the Court offered some implicit instruction for circuit courts subsequently attempting to implement the Court's holding that § 2253(c)(3) is "mandatory but nonjurisdictional."

First, the Court expressed concern that a petitioner who "may have done everything required of him by law" would still suffer the prejudice of "*sua sponte* dismissals and remands" if

⁹² *Gonzalez*, 132 S Ct at 646–47. The specific question on which the COA was granted was when a judgment becomes "final" under 28 USC § 2244(d)(1)(A) for a state prisoner who does not seek review in a state's highest court. *Id.* at 646.

⁹³ *Id.* at 647.

⁹⁴ *Id.*

⁹⁵ *Id.* at 649 & n 4.

⁹⁶ Brief for the Respondent, *Gonzalez v Thaler*, Docket No 10-895, *10–20 (US filed Sept 14, 2000) (available on Westlaw at 2011 WL 4352237), citing 28 USC § 2253(c)(3). The state's argument for different treatment of subsections (c)(2) and (c)(3) was strongly rejected by the *Gonzalez* majority, which stated that if (c)(2) is nonjurisdictional, "[i]t follows that § 2253(c)(3) is nonjurisdictional as well." *Gonzalez*, 132 S Ct at 649. The majority's position was, in turn, strongly disputed by the dissent, which argued that there was nothing inconsistent about treating (c)(2) and (c)(3) differently, as (c)(2) specifies what the judge must find, whereas (c)(3) specifies what the COA must contain. *Id.* at 663–64 (Scalia dissenting).

⁹⁷ *Gonzalez*, 132 S Ct at 649–51.

⁹⁸ *Id.* at 648, citing *Arbaugh v Y & H Corp*, 546 US 500, 515–16 (2006).

⁹⁹ *Gonzalez*, 132 S Ct at 650.

§ 2253(c)(3) were treated as a jurisdictional requirement.¹⁰⁰ Indeed, the petitioner in the case at bar had included both the timeliness and the Sixth Amendment issues in his COA request¹⁰¹ and was therefore not at fault for the defective COA. After a petitioner raises the relevant issues in his COA application, he “has no control over how the judge drafts the COA.”¹⁰² For this reason, the Court was particularly concerned with the harsh results of sua sponte remand and indicated that lower courts should proceed with caution when considering defective COAs sua sponte.

Second, the Court relied on an efficiency rationale to reach its conclusion, observing that jurisdictional treatment of § 2253(c)(3) “would thwart Congress’ intent in AEDPA to eliminate delays in the federal habeas review process.”¹⁰³ More specifically, the Court noted that if courts of appeals were “dutybound to revisit the threshold showing . . . [t]hat inquiry would be largely duplicative of the merits question before the court.”¹⁰⁴ Indeed, in certain circumstances, correcting the COA would be immaterial to the final judgment in the case and the delay of remand would be “particularly fruitless,” such as when “the district court dismiss[e]s the petition on procedural grounds and the court of appeals affirms, without having to address the omitted constitutional issue at all.”¹⁰⁵ Further, the Court concluded that “[e]ven if additional screening of already-issued COAs for § 2253(c)(3) defects could further winnow the cases before the courts of appeals, that would not outweigh the costs of further delay from the extra layer of review.”¹⁰⁶ Like the Seventh Circuit, the Court looked to briefing as a benchmark of resource expenditure and concluded that after a COA has been granted and the case has been briefed, “the COA has fulfilled [its] gatekeeping function.”¹⁰⁷

In dissent, Justice Antonin Scalia criticized the majority’s reliance on an efficiency rationale, emphasizing that “precisely

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* But see *id.* at 664 (Scalia dissenting) (suggesting that the petitioner could have moved to amend the COA).

¹⁰³ *Gonzalez*, 132 S Ct at 650 (quotation marks omitted).

¹⁰⁴ *Id.* at 649.

¹⁰⁵ *Id.* at 650.

¹⁰⁶ *Id.*

¹⁰⁷ *Gonzalez*, 132 S Ct at 650. See also *Miller-El*, 537 US at 337 (describing the CPC and COA requirements as “threshold, or gateway test[s]”).

because it will not be worth the trouble of going back” to correct the COA, the “mandatory” nature of § 2253(c)(3) “has no practical, real-world effect.”¹⁰⁸ To illustrate this point, he posited (and answered) a question: “What is the consequence when the issuing judge, over properly preserved objection, produces a COA like the one here, which does not contain the required opinion? None whatever.”¹⁰⁹ Scalia’s comments recall the Ninth Circuit’s observation that the “proper administration of § 2253(c)” may be a competing concern that weighs against disregarding the requirements of § 2253(c).¹¹⁰ Indeed, strict enforcement of these requirements may actually advance the efficiency goals of the COA requirement by deterring the issuance of defective COAs and by limiting the number of issues ultimately reviewed by the appellate court.¹¹¹ The majority opinion makes clear, however, that its holding does not sanction a complete disregard for the statutory requirements. Rather, as the Court instructs:

[C]alling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored. If a party timely raises the COA’s failure to indicate a constitutional issue, the court of appeals panel *must* address the defect by considering an amendment to the COA or remanding to the district judge for specification of the issues.¹¹²

As the ensuing analysis illustrates, this instruction has done little to foster uniformity among the circuit courts with regard to treatment of defective COAs. The Court’s suggestion that the panel “must address the defect” appears to run counter to its observation that correcting the COA will often be “fruitless.”¹¹³ In addition, *Gonzalez* did not clearly resolve the prior tension between functional efficiency concerns on the one hand and adherence to the plain text of the statute on the other. In light of this continued ambiguity, courts have implemented divergent interpretations of the “mandatory but nonjurisdictional” designation.

¹⁰⁸ *Gonzalez*, 132 S Ct at 658 (Scalia dissenting).

¹⁰⁹ *Id* (Scalia dissenting).

¹¹⁰ *Phelps*, 366 F3d at 728.

¹¹¹ See *Gonzalez*, 132 S Ct at 664 (Scalia dissenting) (“Over the long term, the time saved to judges and lawyers by an *enforceable* requirement that appeals be screened by a single judge may vastly outweigh the time wasted by the occasional need for enforcement.”).

¹¹² *Id* at 651 (emphasis added).

¹¹³ *Id* at 650–51.

II. POST-GONZALEZ CASE LAW: HOW HAVE COURTS TREATED DEFECTIVE COAS?

The *Gonzalez* decision leaves courts with the task of determining what it means for § 2253(c)(3) to be mandatory but non-jurisdictional. Part II.A examines how the circuit courts have treated defective COAs in light of *Gonzalez*. Part II.B then distinguishes the possible scenarios that arise when courts are confronted with defective COAs, contrasting the circumstances in which a defective COA is essentially irrelevant with those in which it may result in an improper expenditure of resources.

A. Appellate Court Treatment of Defective COAs

There are relatively few cases in which a court has expressly acknowledged the impropriety of the COA before it. It is nevertheless likely that appellate courts frequently consider defective COAs without noting the defects. For example, in *Saunders v Senkowski*,¹¹⁴ a pre-*Gonzalez* case, the Second Circuit considered a COA issued on the question whether equitable tolling should apply to the petitioner's case.¹¹⁵ The court "amended the certificate to include the antecedent issue of whether the petition was timely."¹¹⁶ Timeliness issues do not raise constitutional concerns and cannot properly be the basis for the issuance of a COA.¹¹⁷ In *Saunders*, the court gave no indication that it was aware of the § 2253(c)(2) and (c)(3) requirements that the COA specify a *constitutional* issue. Rather, it proceeded to affirm the district court's decision with regard to timeliness and equitable tolling.¹¹⁸ Decisions like *Saunders* suggest that many defective COAs likely pass through the system without acknowledgement, and that courts may be resolving procedural questions without ever commenting on the impropriety of the COA.¹¹⁹

¹¹⁴ 587 F3d 543 (2d Cir 2009).

¹¹⁵ *Id.* at 545.

¹¹⁶ *Id.*

¹¹⁷ See *Ramunno v United States*, 264 F3d 723, 725 (7th Cir 2001) ("Disputes about a petition's timeliness do not support an appeal unless a substantial constitutional issue lurks in the background.").

¹¹⁸ *Saunders*, 587 F3d at 545. Ironically, the Supreme Court cited this case in *Gonzalez* as support for its statement that "[c]ourts of appeals regularly amend COAs or remand for specification of issues." *Gonzalez*, 132 S Ct at 651 n 7, citing *Saunders*, 587 F3d at 545.

¹¹⁹ See, for example, *King v Hobbs*, 666 F3d 1132, 1134 (8th Cir 2012) (making no mention of the defects in a COA granted only on issues of timeliness, and affirming the district court's denial); *Johnson v Hobbs*, 678 F3d 607, 608 (8th Cir 2012) (same).

Despite this, several circuit courts have explicitly discussed how to deal with defective COAs; these cases illustrate the extent to which *Gonzalez* leaves the issue unresolved. In most of the cases discussed below, the Government raised the issue of the defective COA—either to waive or to challenge it. The circuits have divided into two primary groups: those that simply disregard the Government’s challenge to the defect and proceed to the merits, and those that address the defect—either by amending the COA or by vacating and remanding to the district court for specification of the issues.

1. The Third and Sixth Circuits’ approach: proceeding to the merits.

Both the Third and Sixth Circuits appear to disregard COA defects and proceed to the merits of the appeal. For example, in *Sistrunk v Rozum*,¹²⁰ the Third Circuit considered a COA granted by one of the circuit judges on a single issue: “whether Sistrunk’s habeas petition was timely filed according to 28 U.S.C. § 2244(d)(1)(D).”¹²¹ On appeal, the Government challenged the court’s jurisdiction based on the fact that the COA did not state a constitutional claim.¹²² The court rejected the Government’s argument, stating that “[e]ven a defective COA does not thwart [] jurisdiction.”¹²³ Quoting *Gonzalez*, the Third Circuit noted that “[o]nce a judge has made the determination that a COA is warranted . . . the COA has fulfilled [its] gatekeeping function.”¹²⁴ Therefore, the court asserted, “[n]o further scrutiny of the COA is necessary.”¹²⁵ In light of this observation, the court proceeded to consider the certified issue of timeliness and, finding that the petition was untimely, the court affirmed the district court’s denial.¹²⁶

This reading of *Gonzalez* suggests that § 2253(c)(3)’s nonjurisdictional status renders the Government’s objection irrelevant, but such a reading disregards the mandatory nature of the rule, which would generally imply that a court must address a

¹²⁰ 674 F3d 181 (3d Cir 2012).

¹²¹ *Id.* at 184.

¹²² *Id.* at 186.

¹²³ *Id.*

¹²⁴ *Sistrunk*, 674 F3d at 186 (quotation marks omitted).

¹²⁵ *Id.*

¹²⁶ *Id.* at 188.

properly presented challenge.¹²⁷ Notably, the Government's brief in this case was filed before the Supreme Court's *Gonzalez* decision, and *Gonzalez* was decided only shortly before the Third Circuit issued its decision in *Sistrunk*.¹²⁸ For this reason, the Government's brief raised only a jurisdictional challenge to the defective COA.¹²⁹ Therefore, it is possible that the fact that the Government's challenge was purely jurisdictional may have liberated the court to reject the challenge outright by relying on *Gonzalez*'s explicit holding that defective COAs are not a jurisdictional bar. But such an approach fails both to consider the full scope of the *Gonzalez* decision and to give effect to the Court's instruction that circuit courts "must address the defect" when a defective COA is properly challenged.¹³⁰

The Sixth Circuit took a similar approach in *Keeling v Warden, Lebanon Correctional Institution*.¹³¹ In that case, the district court denied the petitioner's habeas petition as time-barred.¹³² The circuit court issued a COA.¹³³ On appeal, the warden challenged the Sixth Circuit's jurisdiction because the COA failed to comply with the requirements of § 2253(c).¹³⁴ Indeed, the COA failed to specify *any* issues.¹³⁵ The court rejected the warden's argument, however, by observing that *Gonzalez* "resolves the issue in favor of jurisdiction."¹³⁶ The court acknowledged *Gonzalez*'s holding that "§ 2253(c)(3)'s requirement is mandatory but nonjurisdictional,"¹³⁷ but having decided the jurisdictional issue, the court proceeded without further discussion of the mandatory

¹²⁷ See Part III.A.

¹²⁸ The Government filed its brief on July 21, 2011. See generally Brief for Appellees, *Sistrunk v Rozum*, Docket No 09-2495 (3d Cir filed July 21, 2011) (available on Westlaw at 2011 WL 10099287) ("*Sistrunk* Government Brief"). The *Gonzalez* decision was handed down on January 10, 2012, and *Sistrunk* was decided on March 20, 2012. *Gonzalez*, 132 S Ct at 641; *Sistrunk*, 674 F3d at 181.

¹²⁹ *Sistrunk* Government Brief at *22 (cited in note 128).

¹³⁰ *Gonzalez*, 132 S Ct at 651.

¹³¹ 673 F3d 452 (6th Cir 2012).

¹³² *Id.* at 457.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Keeling*, 673 F3d at 457.

¹³⁶ *Id.*

¹³⁷ *Id.* A later Sixth Circuit decision grappled with the mandatory/jurisdictional distinction, but to little avail: "[O]ne of the crucial inferences taken from *Gonzalez* is that there is a distinction between a 'mandatory' provision and a 'jurisdictional' provision. While all jurisdictional provisions are mandatory, not all mandatory provisions are jurisdictional. Though not jurisdictional, mandatory provisions must still be followed." *Allen v Parker*, 542 Fed Appx 435, 440 (6th Cir 2013) (citation omitted).

nature of the statutory requirements.¹³⁸ After considering the merits of the case, the court affirmed the district court decision.¹³⁹ As in *Sistrunk*, it is unclear from the opinion whether the court would have treated a nonjurisdictional government challenge to the impropriety of the COA differently; because the warden's challenge alleged lack of jurisdiction, the court was able to simply reject the challenge by citing *Gonzalez*.

Despite the court's approach in *Keeling*, a subsequent Sixth Circuit opinion, *Rayner v Mills*,¹⁴⁰ suggests that the court may in fact consider challenges to "improvidently granted" COAs.¹⁴¹ In *Rayner*, the court rejected the state's challenge to an allegedly defective COA, explaining that the state should have raised its challenge in a motion to dismiss.¹⁴² Instead of citing to *Gonzalez* as it did in *Keeling*, the court relied on the Sixth Circuit's pre-*Gonzalez*, efficiency-centric approach.¹⁴³ Thus, it declined to consider the challenge because the parties had already completed their briefing on the merits.¹⁴⁴ Although the Sixth Circuit did not explicitly state that the Government had forfeited its challenge, rejecting the challenge because it was not raised in a timely fashion resembles a forfeiture regime. Such a regime, however, is not entirely consistent with the court's approach in *Keeling*, which premised rejection of the challenge on *Gonzalez*. While the Sixth Circuit's methodology for disposing of defective COAs is somewhat unclear in light of *Rayner*, *Keeling* indicates that the court has failed to firmly adopt the approach recommended by *Gonzalez*. Rather, both the Third and Sixth Circuits proceed to the merits of the appeal even in the face of a government challenge to a defective COA. This approach is clearly in tension with the *Gonzalez* Court's command that "if a party timely raises the COA's failure to indicate a constitutional issue, the court of appeals *must* address the defect."¹⁴⁵

¹³⁸ *Keeling*, 673 F3d at 457–65.

¹³⁹ *Id.* at 465.

¹⁴⁰ 685 F3d 631 (6th Cir 2012).

¹⁴¹ *Id.* at 635 n 1.

¹⁴² *Id.*

¹⁴³ *Id.*, citing *Porterfield v Bell*, 258 F3d 484, 485 (6th Cir 2001).

¹⁴⁴ *Rayner*, 685 F3d at 635 n 1.

¹⁴⁵ *Gonzalez*, 132 S Ct at 651 (emphasis added).

2. The Fifth, Seventh, and Eleventh Circuits' approach:
taking remedial action.

Unlike the Third and Sixth Circuits, the Fifth, Seventh, and Eleventh Circuits generally take some type of remedial action when faced with defective COAs. While the Fifth Circuit does not raise COA defects *sua sponte*, it does respond to government challenges to COAs. For example, in *Jones v Stephens*,¹⁴⁶ the Fifth Circuit vacated a COA after “[t]he State timely raised the issue of the COA’s validity.”¹⁴⁷ The court observed that although it had jurisdiction to hear the appeal and was not “foreclosed from ruling” on the certified procedural issue, the § 2253(c) requirements were still mandatory and remand was appropriate.¹⁴⁸

While the Seventh Circuit has not expressly taken up the issue of defective COAs post-*Gonzalez*, its dicta seems to suggest that it would follow an approach similar to that of the Fifth Circuit. For example, in *Ingram v United States*,¹⁴⁹ the court observed that “[a] certificate’s failure to comply with § 2253(c)(2) or (3) . . . may create obstacles to a prisoner’s success on appeal.”¹⁵⁰ This statement suggests that the Seventh Circuit may, at least in some circumstances, intervene when confronted with a defective COA. In *Ingram*, however, the Government waived its objection to the defect, removing “any procedural obstacle to [habeas] relief.”¹⁵¹ The Seventh Circuit indicated that the Government’s waiver rendered it unnecessary to remedy the defective COA.¹⁵² The court’s reliance on the waiver suggests that, had the Government challenged the COA, the court would have taken some remedial action.

The Eleventh Circuit has taken a stricter approach to the treatment of defective COAs. It often “vacate[s] the COA and remand[s] to the district court, instructing the district court to either explicitly certify the constitutional issues or—if none exist[s]—deny the petitioner’s request.”¹⁵³ Alternatively, the court

¹⁴⁶ 541 Fed Appx 399 (5th Cir 2013).

¹⁴⁷ *Id.* at 410.

¹⁴⁸ *Id.*

¹⁴⁹ 541 Fed Appx 707 (7th Cir 2013).

¹⁵⁰ *Id.* at 708.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Penney v Department of Corrections*, 707 F3d 1239, 1242 (11th Cir 2013). See also *Powell v Davis*, 574 Fed Appx 921, 922 (11th Cir 2014) (“[B]ecause the COA does not list as an issue the denial of a federal constitutional right . . . we must vacate the COA as

may simply amend the COA itself to include the required constitutional issue.¹⁵⁴

The Eleventh Circuit recently broke from this pattern, though it coupled its decision with an announcement that it would not do so in the future. In *Spencer v United States*,¹⁵⁵ the court chose to “exercise [its] discretion to decide this appeal despite a defective certificate of appealability.”¹⁵⁶ The court noted that

[n]either issue in the certificate for this appeal even purports to involve an underlying error of constitutional magnitude, but we decline to vacate the certificate at this late hour. The parties have litigated this matter before the district court, before a panel of this Court, and before our en banc Court.¹⁵⁷

In making this observation, the court cited to the Ninth Circuit’s efficiency-based decision in *Phelps v Alameda*.¹⁵⁸ It went on to emphasize that the parties had “briefed and orally argued this appeal twice” and that the court had also heard an amicus curiae on the case.¹⁵⁹ Even more importantly, “both parties [] urged [the court] not to vacate the defective certificate that [it] erroneously issued.”¹⁶⁰ In light of these factors, the court agreed to decide the appeal. But it issued a rather novel warning: “We will not be so lenient in future appeals when a certificate fails to conform to the gatekeeping requirements imposed by Congress.”¹⁶¹ Instead, the court explained, failure to “specify what constitutional issue jurists of reason would find debatable . . . will result in vacatur of the certificate.”¹⁶² The court’s rationale behind this

improvidently granted and dismiss this appeal.”). This approach conforms with the Eleventh Circuit’s approach pre-*Gonzalez*. See, for example, *Bell v Florida Attorney General*, 614 F3d 1230, 1232 (11th Cir 2010); *Peoples v Haley*, 227 F3d 1342, 1347 (11th Cir 2000); *Hunter v United States*, 101 F3d 1565, 1584 (11th Cir 1996) (remanding but not vacating a COA that did not specify a constitutional issue for appeal).

¹⁵⁴ See *Penney*, 707 F3d at 1242.

¹⁵⁵ 773 F3d 1132 (11th Cir 2014).

¹⁵⁶ *Id.* at 1137.

¹⁵⁷ *Id.* The issues on appeal were related to the misapplication of the advisory United States Sentencing Guidelines and did not “raise constitutional concerns.” *Id.* at 1140.

¹⁵⁸ 366 F3d 722 (9th Cir 2004). See also *Spencer*, 733 F3d at 1137, citing *Phelps*, 366 F3d at 728 (explaining that when the parties have already briefed the merits of the case, examination of the COA may not further efficiency goals).

¹⁵⁹ *Spencer*, 733 F3d at 1137–38.

¹⁶⁰ *Id.* at 1138.

¹⁶¹ *Id.*

¹⁶² *Id.*

decision was straightforward: defective certificates “violate the text enacted by Congress.”¹⁶³ Although the court acknowledged the *Gonzalez* holding, it quickly added: “But even so, we cannot ignore the clear command of Congress articulated in subsections 2253(c)(2) and (3).”¹⁶⁴ This emphasis on fidelity to the text of the statute is consistent with the Eleventh Circuit’s pre-*Gonzalez* approach.¹⁶⁵ The *Spencer* decision is nevertheless remarkable for its announcement that the court will not only respond to government challenges to COAs but also act sua sponte to vacate defective COAs.

Despite the strong language of *Spencer*, the Eleventh Circuit’s strict approach may prove untenable. In the recent case *Damren v Florida*,¹⁶⁶ the court chose to decide the merits of a habeas petition certifying only a procedural issue despite its recent announcement in *Spencer*.¹⁶⁷ Although the court acknowledged that it is “generally not free to entertain [] an appeal if the COA does not spell out one or more issues on which the petitioner has made a substantial showing of the denial of a constitutional right,” it invoked an efficiency rationale to justify reaching the merits.¹⁶⁸ The court highlighted the decade-long “procedural journey” of the case, which included a prior appeal to the circuit court and “the parties’ thorough briefing” of the procedural issue.¹⁶⁹ In light of these sunk costs, it concluded that “the most efficient course is to reach the issue.”¹⁷⁰ This decision, while in line with the action actually taken by the court in *Spencer*, is inconsistent with *Spencer*’s strong warning that the court would, “[g]oing forward,” vacate defective COAs.¹⁷¹ This inconsistency suggests that while the Eleventh Circuit prefers strict implementation of the statute, its textualist approach may give way to compelling efficiency considerations in extraordinary circumstances. Yet despite the Eleventh Circuit’s disregard in *Damren* for its *Spencer* warning, the court reiterated that it is

¹⁶³ *Spencer*, 733 F3d at 1138.

¹⁶⁴ *Id.* at 1137.

¹⁶⁵ See, for example, *Peoples*, 227 F3d at 1347 (vacating and remanding a defective COA in order “[t]o be faithful to the amended version of section 2253(c)”).

¹⁶⁶ 776 F3d 816 (11th Cir 2015).

¹⁶⁷ *Id.* at 820–21.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Damren*, 776 F3d at 820–21.

¹⁷¹ *Spencer*, 733 F3d at 1138.

“generally not free” to consider appeals based on defective COAs, reaffirming its broader intention to raise defects sua sponte.¹⁷²

Two very recent cases confirm that the Eleventh Circuit intends to heed the *Spencer* warning in the future. First, in *Dauphin v United States*,¹⁷³ the court raised a COA defect sua sponte, noting that “neither party ha[d] addressed the sufficiency of the COA.”¹⁷⁴ It quoted in full the *Spencer* court’s announcement regarding treatment of defective COAs.¹⁷⁵ In light of this language, the court chose to expand the COA to add an underlying constitutional issue, in order “to conform with *Spencer*.”¹⁷⁶ A subsequent case, *Bucklon v Secretary, Florida Department of Corrections*,¹⁷⁷ reemphasized the Eleventh Circuit’s commitment to *Spencer*.¹⁷⁸ It recognized that the COA in the case at bar did not meet the requirements of § 2253(c), but it explained that the COA had been granted prior to the *Spencer* decision and that the court would therefore decide the appeal.¹⁷⁹ It reiterated, however, that “for certificates granted after [the] *Spencer* decision, the certificate must specify for what issue the prisoner has made a substantial showing of the denial of a constitutional right.”¹⁸⁰ Both *Dauphin* and *Bucklon* suggest that, going forward, the Eleventh Circuit intends to adhere to its cautionary statement in *Spencer*. This approach conflicts with the *Gonzalez* Court’s concern that the sua sponte remands required by jurisdictional treatment would lead to unfair prejudice to petitioners.¹⁸¹

* * *

Ultimately, the Third and Sixth Circuits’ approach and the Eleventh Circuit’s approach fall on different extremes of the spectrum—while the former disregards all COA defects and proceeds to the merits, the latter addresses COA defects even when no party has challenged the COA. Though in direct tension with one another, neither approach meaningfully implements the

¹⁷² *Damren*, 776 F3d at 820.

¹⁷³ 2015 WL 1137154 (11th Cir).

¹⁷⁴ *Id.* at *2.

¹⁷⁵ *Id.*, quoting *Spencer*, 733 F3d at 1138.

¹⁷⁶ *Dauphin*, 2015 WL 1137154 at *2.

¹⁷⁷ 2015 WL 1321470 (11th Cir).

¹⁷⁸ *Id.* at *2 n 4.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See *Gonzalez*, 132 S Ct at 650.

command that § 2253(c) is mandatory but nonjurisdictional. In contrast, the Fifth and Seventh Circuits' intermediate approach appears to strike a balance between efficiency considerations and adherence to the text of the statute.

B. Disregarding the Rule: When Might It Matter?

The Third and Sixth Circuits' approach directly contradicts the *Gonzalez* Court's statement that courts *must* address a defective COA when the issue is raised by one of the parties. It also gives short shrift to the statutory language, which instructs that the court "*shall* indicate" an issue that constitutes a substantial showing of a denial of a constitutional right.¹⁸² Indeed, Justice Scalia's critique that the majority's opinion in *Gonzalez* permits a judge to produce a defective COA without the slightest consequence¹⁸³ is particularly resonant in light of the Third Circuit's conclusion that once a judge has issued a COA, "[n]o further scrutiny" is required.¹⁸⁴ The extent to which these circuits disregard both the Supreme Court's and Congress's instructions is, on its face, rather alarming.

However, an honest discussion of the problems presented by courts' interpretations of *Gonzalez* and treatments of defective COAs must acknowledge the practical limits of their relevance. There are four possible outcomes that can result when a court disregards the impropriety of a COA.¹⁸⁵ First, the court of appeals may simply deny the appeal (and affirm the lower court's dismissal of the habeas petition) on the constitutional issues. Second, the court of appeals may grant the appeal on the merits. Third, the court may affirm the district court's denial on procedural grounds. Fourth, the court may, without acknowledging

¹⁸² 28 USC § 2253(c)(3) (emphasis added).

¹⁸³ *Gonzalez*, 132 S Ct at 658 (Scalia dissenting). See also *Ramunno*, 264 F3d at 725 ("[T]he possibility of review is essential if the statutory limits are to be implemented. Otherwise district judges have the authority to issue certificates of appealability for any reason at all, and as open-ended as they please.").

¹⁸⁴ *Sistrunk*, 674 F3d at 186.

¹⁸⁵ For simplicity's sake, this Section refers solely to procedural and constitutional issues. However, it is important to recognize that habeas relief may also be granted on the basis of federal statutory claims, so the procedural/constitutional dichotomy does not represent the full scope of possibilities. See, for example, 28 USC § 2255 (allowing a prisoner who claims that his "sentence was imposed in violation of the Constitution or laws of the United States" to apply for habeas relief) (emphasis added). These federal statutory claims, which arise purely in the context of § 2255 petitions brought by federal prisoners rather than habeas corpus petitions brought by state prisoners, are beyond the scope of this Comment.

the defect in the COA, reverse the district court's procedural determination and remand to the district court for further proceedings. While the court technically disregards the dictates of § 2253(c)—as well as the *Gonzalez* Court's instruction that § 2253(c)(3) is mandatory—in each of these situations, only the fourth raises concerns about dedicating resources to appeals that Congress intended to preclude through the COA requirement. This Section illustrates why remand following an appeal based on an improperly certified procedural issue is uniquely concerning and explains why such cases create a compelling need to establish a uniform manner of dealing with defective COAs.

1. Circumstances in which a defective COA is effectively irrelevant.

The first three outcomes described above indicate that there are circumstances in which a defective COA, while formally improper, essentially fulfills the requirements of § 2253(c). That is, the defective COA does not consume judicial resources beyond those that would otherwise have been required in examining the propriety of the COA. When a court either denies or grants an appeal on the merits, rather than dealing with the defective COA, the logical inference—and the practical effect—is that the court has implicitly ruled first on the COA, either granting or denying it. For example, in the exceedingly rare circumstance that a court faced with a defective COA reviews the record and grants habeas relief to the petitioner on the merits of a constitutional claim, the natural implication is that the applicant made a “substantial showing of the denial of a constitutional right.”¹⁸⁶ The fact that the district court or circuit judge failed to specify that issue in the original COA becomes irrelevant: If the circuit court had taken the time to review and amend the COA, it would most certainly have found a substantial showing of the denial of a constitutional right. Indeed, failure to do so would preclude a grant of relief on the merits.

Similarly, when a circuit court denies a habeas petition on its constitutional merits, affirming a district court dismissal, there are two possible logical inferences: (1) the circuit court also

¹⁸⁶ 28 USC § 2253(c)(2).

implicitly denied the petitioner a COA,¹⁸⁷ or (2) the circuit court implicitly granted the COA but subsequently denied the writ on the merits. The first possibility arises if the court, in reviewing the record, concludes that there is no substantial showing of the denial of a constitutional right. The second possible inference arises because “a COA will issue in some instances where there is no certainty of ultimate relief.”¹⁸⁸ That is, an applicant could make a substantial showing of the denial of a constitutional right that, on further consideration, did not suffice for habeas relief.¹⁸⁹ Therefore, it is possible to imagine that the court of appeals implicitly *granted* the COA but subsequently denied the petition on the merits. The result is the same regardless—consideration and affirmation of the lower court dismissal by the circuit court. Indeed, the Eighth Circuit recognized as much in *Tiedeman v Benson*,¹⁹⁰ stating: “If we believed that the issues were without substance, we would simply summarily affirm the judgment, instead of taking the intermediate and wholly unnecessary step of vacating the certificate of appealability.”¹⁹¹ This approach is consistent with other sections of AEDPA. For example, § 2254(b)(2) provides that a court may dismiss a habeas petition on the merits without first considering procedural obstacles.¹⁹² This provision recognizes that a merits determination may be easier and more efficient than consideration of difficult procedural questions. Such logic can reasonably be extended to the treatment of COAs.

The third scenario occurs when a COA specifies a procedural rather than a substantive issue and the circuit court affirms the lower court’s denial on procedural grounds. This is the most

¹⁸⁷ Note that this scenario is very similar to circumstances in which the circuit court, faced with a defective COA, opts to instead treat the notice of appeal as a COA application addressed to the circuit court—as permitted by FRAP 22(b)(2)—and subsequently denies the COA application. See, for example, *Tiedeman v Benson*, 122 F3d 518, 522–23 (8th Cir 1997).

¹⁸⁸ *Miller-El*, 537 US at 337.

¹⁸⁹ See generally, for example, *Donaldson v United States*, 379 Fed Appx 492 (6th Cir 2010) (affirming a district court’s denial of an ineffective assistance of counsel claim, pursuant to a proper COA).

¹⁹⁰ 122 F3d 518 (8th Cir 1997).

¹⁹¹ *Id* at 522.

¹⁹² 28 USC § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”). See also *Slack*, 529 US at 485 (“[A] court may find that it can dispose of the [COA] application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.”).

common category of cases because procedural issues so frequently bar habeas relief.¹⁹³ Such cases play out similarly to those in the second scenario discussed above. The court of appeals, in affirming the denial on procedural grounds, may be implicitly denying the COA—either because of the lack of an underlying constitutional issue or because the procedural issue on which the petition was denied was not debatable. If this is the case, affirming the denial of the habeas petition simply skips the unnecessary step of vacating the COA. On the other hand, the court of appeals may be thought to have implicitly granted the COA on the issue but to have subsequently concluded that the procedural issue precluded habeas relief. Here, once again, the court simply eliminates the procedural formality of remanding or amending the COA prior to issuing its decision.

A final point must be made regarding merits decisions: habeas corpus relief may be granted when an inmate is held “in violation of the Constitution or laws or treaties of the United States.”¹⁹⁴ This includes not only constitutional claims but also federal statutory claims and treaty claims.¹⁹⁵ The COA requirement nevertheless restricts appeals to constitutional issues, indicating Congress’s intent “to foreclose appeals of statutory claims—even those that are meritorious.”¹⁹⁶ Practically, however, this fact does not often impact habeas petitions brought by state prisoners, because habeas claims for violations of federal statutory law are essentially nonexistent and Congress has been loath to regulate state criminal proceedings.¹⁹⁷

¹⁹³ See, for example, *Sistrunk*, 674 F3d at 184; *Keeling*, 673 F3d at 454; *Damren*, 776 F3d at 817; *Saunders*, 587 F3d at 545; *Gonzalez*, 132 S Ct at 646–47.

¹⁹⁴ 28 USC § 2241(c)(3).

¹⁹⁵ For a rare case in which a habeas petition raised treaty claims, see generally *Medellín v Texas*, 552 US 491 (2008). For an example of a case brought by a federal prisoner raising a federal statutory claim, see generally *Ingram*, 541 Fed Appx 707.

¹⁹⁶ Hagglund, Comment, 72 U Chi L Rev at 1018 (cited in note 77). See also *Young v United States*, 124 F3d 794, 799 (7th Cir 1997) (explaining the difference between the habeas corpus standard, which “authorizes relief when the sentence violates the Constitution or laws of the United States,” and § 2253(c), which “authorizes appeal when there has been a substantial showing that the sentence violates the Constitution,” and concluding that “[i]f the district court denies a petition based on a statutory issue, § 2253(c)(2) precludes an appeal”). But see *United States v Cepero*, 224 F3d 256, 264 (3d Cir 2000) (en banc) (“Neither the Conference Report nor the accompanying bill explained why the language of § 2253(c) referred to ‘constitutional’ and not ‘federal’ rights.”).

¹⁹⁷ This observation varies significantly in the context of federal prisoners seeking relief under 28 USC § 2255. While 28 USC § 2254 governs habeas petitions for state prisoners, federal prisoners must petition for relief under § 2255. A thorough discussion of § 2255 petitions is beyond the scope of this Comment, but it is important to recognize that the COA requirement also applies to these prisoners. See 28 USC § 2253(c)(1)(B).

Because § 2253(c)(3) is nonjurisdictional, dismissing the case on the most expedient grounds makes sense. The *Gonzalez* Court sanctioned this approach when it noted that remanding with instructions to dismiss the appeal based on a § 2253(c)(3) defect “would be particularly fruitless in the numerous cases where . . . the district court dismissed the petition on procedural grounds and the court of appeals affirms.”¹⁹⁸ As a technical matter, this approach “allow[s] habeas appellants to receive an undeserved appeal . . . [and] permits the appellate process to proceed in cases . . . that Congress intended to remove from the habeas appellate process.”¹⁹⁹ But as a practical matter, when a court resolves the case on the merits in spite of a defective COA, the habeas appellant receives no review beyond that which he would receive if the court were to review the propriety of the COA itself. Thus, the goals of § 2253(c) are fulfilled even when courts omit the formal motions that the statute would require if it were strictly implemented.

Moreover, this practical approach is consistent with the way in which other elements of the statute are carried out. For example, FRAP 22(b)(2) permits circuit courts to treat notices of appeal as applications for COAs when no express request for a certificate is filed.²⁰⁰ And the Seventh Circuit is even willing to interpret an argument made in an appellate brief “as an implicit request for a certificate of appealability on [an] issue.”²⁰¹ Therefore, while the Supreme Court recognizes the importance of the COA’s gatekeeping function, a formalistic approach is taken only with regard to the initial issuance of the COA.

2. Circumstances in which a defective COA improperly revives a petitioner’s claim.

There is, however, one situation in which a court’s consideration of the merits of a case based on a defective COA essentially breathes new life into a petitioner’s case when Congress, through AEDPA, intended to preclude an appeal. This

For these petitioners, permitting consideration of defective COAs may permit relief on the basis of a federal statutory claim despite the fact that § 2253(c) seems to clearly indicate that stand-alone statutory claims cannot be appealed. See, for example, *Ingram*, 541 Fed Appx at 709 (remanding for resentencing on the basis of a statutory claim); *Dahler v United States*, 143 F3d 1084, 1088–89 (7th Cir 1998) (same).

¹⁹⁸ *Gonzalez*, 132 S Ct at 650.

¹⁹⁹ Hagglund, Comment, 72 U Chi L Rev at 1010 (cited in note 77).

²⁰⁰ FRAP 22(b)(2).

²⁰¹ *Buggs v United States*, 153 F3d 439, 443 (7th Cir 1998).

circumstance arises when the COA certifies only a procedural issue, rendering it defective, and the circuit court reverses the district court ruling on the procedural issue, remanding the case for further consideration.²⁰² In these situations, the district court will consider the habeas petitioner's case for a second time. To fully illustrate this fact, imagine that a proper COA is a jurisdictional requirement: The court of appeals would receive a COA certifying only a procedural issue and would vacate the COA or remand to the district court to either vacate or amend the COA. Assuming that there was no substantial showing of the denial of a constitutional right that could justify the issuance of a COA—regardless of the presence of a dubious or complex procedural ruling—the district court would vacate the COA and the petitioner's case would end.

By contrast, under the Third Circuit's nonjurisdictional and effectively nonmandatory regime, the court of appeals would disregard the defects in the COA and consider the specified procedural issue. Upon consideration of the difficult procedural issue, the court might reverse the district court's procedural ruling and remand for further consideration. The district court would, in turn, retract its procedural ruling and return to the merits of the case. By virtue of the invalid appeal, the procedural grounds on which the petition was previously denied would no longer bar relief, and the district court would need to either identify another procedural bar to habeas relief or evaluate the constitutional merits of the case. Interestingly, the extra expenditure of judicial resources comes not only at the appellate court level—where resolution of the procedural issue is an expense not authorized by § 2253(c)—but also at the district court level, where the habeas petitioner has the opportunity to twice plead his case on the merits, by virtue of his success on a statutorily invalid appeal.

This extra expenditure of resources at the local level—that is, in each individual case—must be weighed against the systemic efficiency gains of resolving complex procedural questions. Because AEDPA raises a multitude of challenging procedural

²⁰² See, for example, *Thomas v Greiner*, 174 F3d 260, 261 (2d Cir 1999) (reversing the district court's dismissal of a habeas petition as time-barred and remanding "for consideration of the merits of the petition"). See also, for example, *Pierson v Dormire*, 484 F3d 486, 495 (8th Cir 2007) (reversing the district court's dismissal of a habeas petition as untimely filed and remanding to the district court for further proceedings); *Nichols v Bowersox*, 172 F3d 1068, 1077 (8th Cir 1999) (same).

issues, prompt appellate-level resolution of these types of questions can significantly reduce costs at the district court level. Systemically, it may be more efficient for an appellate court to rule once on an issue than for district courts to struggle repeatedly with the same question.²⁰³ Requiring appellate courts to wait until they are presented with proper COAs in order to clarify contested procedural questions delays resolution of these issues and may result in a greater expenditure of resources at the district court level. This is all the more true because, although there are many habeas petitions that raise procedural issues, the high rate of denial of the writ suggests that few of these petitions are able to make the substantial showing of the denial of a constitutional right required for the issuance of a proper COA. Therefore, the efficiency gained from the prompt resolution of open procedural questions may counteract the additional cost associated with remand to the district court. While it is difficult to determine the costs of remand relative to the systemic costs of unresolved questions of law, it is important to recognize that efficiency considerations do not unequivocally point in one direction.

Ultimately, while it seems that consideration of defective COAs raises concerns in only a narrow subset of cases, the topic deserves further discussion for several reasons. First, this subset of cases likely represents a substantial portion of appealed habeas cases, as a large portion of petitions are dismissed on procedural grounds rather than on the merits.²⁰⁴ It is also worth noting that § 2253(c) is concerned not with excessive relief for habeas petitioners—rates of relief remain extremely low—but rather with excessive, frivolous appeals and unnecessary delays.²⁰⁵ Therefore, in considering the importance of any COA-related issue, the question is not whether a new rule will alter

²⁰³ See Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 Ala L Rev 339, 360 (2009) (“Appellate courts should serve to develop the law in a particular area as guidance for future cases.”); *Mucha v King*, 792 F2d 602, 605–06 (7th Cir 1986) (stating that appellate courts’ “main responsibility is to maintain the uniformity and coherence of the law”).

²⁰⁴ See King, Cheesman, and Ostrom, *Final Technical Report* at *45 (cited in note 29) (finding that 58 percent of noncapital cases are terminated with no consideration of the merits).

²⁰⁵ See *Miller-El*, 537 US at 337 (“By enacting AEDPA . . . Congress confirmed the necessity and the requirement of differential treatment for those appeals deserving of attention from those that plainly do not.”). See also *Joint Explanatory Statement* at 7462 (cited in note 37) (explaining that the AEDPA reforms were intended “to address the acute problems of unnecessary delay and abuse in capital cases”).

the outcome for individual petitioners seeking relief, but rather whether it will have a substantial impact on the expenditure (or conservation) of judicial resources spent on habeas appeals.

Second, the Supreme Court's resolution of the circuit split in *Gonzalez* failed to bring uniformity to the treatment of defective COAs. Therefore, the concerns that motivated the Court to grant certiorari persist. For one, disparities among the circuits continue to provide differing levels of review for similarly situated habeas petitioners. Moreover, while *Gonzalez* instructs courts not to unnecessarily expend judicial resources on a requirement that is in fact nonjurisdictional, the underlying goal of the opinion is to strike a precise balance between the appropriate expenditure of judicial resources and adherence to the statute's text. This aim is particularly pertinent in light of appellate courts' failure to give meaning to *Gonzalez's* holding that § 2253(c)(3) is mandatory but nonjurisdictional.²⁰⁶ To the extent that the majority's holding was dependent on the presumption that courts would adhere to the mandatory nature of the statute despite its nonjurisdictional character, the Third and Sixth Circuits' approach undermines the Court's holding and jeopardizes the scheme that Congress devised for habeas relief in AEDPA. Indeed, disregard of this mandatory rule may also throw into question the validity of other mandatory-but-nonjurisdictional rules that could otherwise provide an optimal measure of enforcement without the added costs of jurisdictional treatment.²⁰⁷

* * *

In sum, although there are various circumstances in which consideration of an appeal on the basis of a defective COA does not hinder the underlying screening goals of § 2253(c), the

²⁰⁶ See Part II.A.

²⁰⁷ See Scott Dodson, *Mandatory Rules*, 61 *Stan L Rev* 1, 6 (2008) (noting that adherence to a "false dichotomy" between jurisdictional and nonjurisdictional rules "may lead to an incorrect result or doctrinal confusion"). See also *Henderson v Shinseki*, 131 S Ct 1197, 1202 (2011) ("Jurisdictional rules may [] result in the waste of judicial resources and may unfairly prejudice litigants."). Respecting the mandatory nature of non-jurisdictional claim-processing rules helps lessen the incentive to use the term "jurisdictional" imprecisely to emphasize the mandatory nature of a rule when the rule does not actually bear on the court's adjudicatory authority. See, for example, *Kontrick v Ryan*, 540 US 443, 454 (2004) (noting the "less than meticulous" use of the term "jurisdictional" in past cases); *Eberhart v United States*, 546 US 12, 16 (2005) ("Clarity would be facilitated . . . if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases . . . falling within a court's adjudicatory authority.") (quotation marks omitted).

subset of cases in which such consideration does contravene the statute warrants resolution of the proper treatment of defective COAs. Ultimately, establishing a principled and consistent approach to dealing with defective COAs is necessary in order to preserve the integrity of the *Gonzalez* decision and give meaning to the plain language of § 2253(c).

III. IN SEARCH OF A UNIFIED APPROACH: HOW SHOULD COURTS TREAT DEFECTIVE COAS?

This Part proposes an approach to the treatment of defective COAs that will give effect to the “mandatory” nature of § 2253(c)(3) while simultaneously taking into consideration the efficiency concerns that informed the *Gonzalez* decision.²⁰⁸ Part III.A begins with a brief overview of the scholarly and judicial discussion regarding the proper definition of mandatory-but-nonjurisdictional rules to provide a broader context within which to consider § 2253(c)(3). Part III.B discusses a sampling of mandatory procedural rules to further solidify the meaning of the term “mandatory” and to determine which characteristics of these rules might reasonably apply to § 2253(c)(3). Part III.C then returns to the language of *Gonzalez* and applies these points of comparison to conclude that courts should treat the COA requirements as they treat other mandatory rules. Finally, Part III.D illustrates the way that this mandatory model advances the efficiency goals of the COA requirements without disregarding the *Gonzalez* Court’s designation of these requirements as mandatory.

A. Mandatory Rules: Theory

Courts and scholars have proposed various formulations to define mandatory rules, most often by comparing and contrasting them with jurisdictional rules.²⁰⁹ The key characteristics that distinguish jurisdictional and nonjurisdictional rules are susceptibility to waiver and forfeiture, *sua sponte*

²⁰⁸ See *Gonzalez*, 132 S Ct at 650.

²⁰⁹ See, for example, Dodson, 61 Stan L Rev at 4 (cited in note 207) (defining a mandatory rule as “a species of nonjurisdictional rules that has both nonjurisdictional and jurisdictional effects”); Howard M. Wasserman, *The Demise of “Drive-By Jurisdictional Rulings”*, 105 Nw U L Rev 947, 962 (2011). See also generally Aaron R. Petty, *Personal Jurisdiction as a Mandatory Rule*, 44 U Memphis L Rev 1 (2013); Scott Dodson, *Appreciating Mandatory Rules: A Reply to Critics*, 102 Nw U L Rev Colloquy 228 (2008); Scott Dodson, *Jurisdictionality and Bowles v. Russell*, 102 Nw U L Rev Colloquy 42 (2007).

consideration, and the availability of equitable excuse.²¹⁰ Waiver is defined as the “intentional relinquishment or abandonment of a known right.”²¹¹ Forfeiture is “the failure to make the timely assertion of a right.”²¹² A simple example of a waivable and forfeitable right is the right to raise a statute of limitations defense in an ordinary civil proceeding. Under the Federal Rules of Civil Procedure, a defendant’s failure to assert a statute of limitations defense in his answer or in a subsequent amendment leads to forfeiture of that defense.²¹³ The only distinction between waiver and forfeiture in such a circumstance is the defendant’s state of mind. If the defendant purposefully omitted the defense, he waived the issue; if the omission was inadvertent, he forfeited the issue. Whether it was waived or forfeited, the defendant is barred from raising the defense in the future.

Jurisdictional rules require sua sponte consideration, and the parties or the court can raise them at any stage of the litigation process.²¹⁴ These rules cannot be waived or forfeited, and they are generally not subject to equitable exception.²¹⁵ In contrast, Professor Scott Dodson defines a mandatory rule as a rule that is

nonjurisdictional but nevertheless has the jurisdictional attribute of being unsusceptible to equitable excuses for noncompliance. Thus, a mandatory rule has the nonjurisdictional attributes of being waivable, forfeitable, and consentable, and a court has no obligation to monitor it sua sponte. However, if the rule is properly invoked by the party for whose benefit it lies, a court has no discretion to excuse noncompliance.²¹⁶

The crux of Dodson’s definition of mandatory rules is the court’s inability to exercise its discretion to excuse noncompliance. In the context of § 2253(c), this would mean that a properly asserted challenge to a defective COA could not be disregarded, even

²¹⁰ See Dodson, 61 Stan L Rev at 3 (cited in note 207).

²¹¹ *United States v Olano*, 507 US 725, 733 (1993) (quotation marks omitted).

²¹² Id. But note that “jurists often use the words [waiver and forfeiture] interchangeably.” *Kontrick v Ryan*, 540 US 433, 458 n 13 (2004).

²¹³ See FRCP 8(c), 12(b). See also *Day v McDonough*, 547 US 198, 202 (2006).

²¹⁴ See Wasserman, 105 Nw U L Rev at 962 (cited in note 209). See also *Gonzalez*, 132 S Ct at 648 (describing the “‘drastic’ consequences” of jurisdictional rules).

²¹⁵ See *Gonzalez*, 132 S Ct at 648; Petty, 44 U Memphis L Rev at 16–17 (cited in note 209).

²¹⁶ Dodson, 61 Stan L Rev at 9 (cited in note 207).

when efficiency considerations counsel strongly in favor of deciding the case on the merits.

However, this is not the only possible definition of a mandatory rule. Justice David Souter, in his dissent in *Bowles v Russell*,²¹⁷ instead describes a mandatory-but-nonjurisdictional rule as one that “is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, [but that] may be waived or mitigated in exercising reasonable equitable discretion.”²¹⁸ Dodson criticizes this definition, noting that “[a]llowing a ‘mandatory’ rule to be subject to equitable discretion would render the ‘mandatory’ moniker meaningless, for there would be nothing ‘mandatory’ about it.”²¹⁹ This criticism is particularly salient in the context of defective COAs because in most cases, “it will not be worth the trouble of going back” to correct defects.²²⁰ Thus, permitting a court to exercise its discretion in responding to challenges will frequently lead to disregard of the challenges—and, by extension, of the statutory text—in favor of deciding the appeal on efficiency grounds. For this reason, Dodson’s definition of the term “mandatory” is superior to a more flexible definition.

Indeed, an overly flexible approach to defining “mandatory” rules risks discouraging their use. Enhancing the legitimacy and reliability of mandatory rules may be beneficial because courts can “further[] systemic objectives without overexpanding or distorting the concept of adjudicative jurisdiction.”²²¹ In other words, if courts are hesitant to label rules as mandatory but nonjurisdictional for fear that they will simply be disregarded, there is a greater risk of improperly labeling rules as jurisdictional and “therefore increas[ing] costs to both the parties and the court, which must police the rule sua sponte.”²²²

²¹⁷ 551 US 205 (2007).

²¹⁸ Id at 216 (Souter dissenting). Souter drew support for this definition from past Supreme Court cases that excused untimely filings in light of district court errors that misled the litigants. Id at 219 (Souter dissenting). AEDPA’s statute of limitations, as interpreted by the Supreme Court, could be seen as a rule that fits Souter’s definition: while it is generally mandatory, it is subject to equitable tolling in narrow circumstances. See *Holland v Florida*, 560 US 631, 645 (2010).

²¹⁹ Dodson, 61 Stan L Rev at 9 n 41 (cited in note 207).

²²⁰ *Gonzalez*, 132 S Ct at 658 (Scalia dissenting).

²²¹ Wasserman, 105 Nw U L Rev at 963 (cited in note 209).

²²² Petty, 44 U Memphis L Rev at 29 (cited in note 209). See also *Henderson v Shinseki*, 131 S Ct 1197, 1202 (“Jurisdictional rules may [] result in the waste of judicial resources and may unfairly prejudice litigants.”); *Eberhart v United States*, 546 US 12, 16 (“Clarity would be facilitated . . . if courts and litigants used the label ‘jurisdictional’

The inclination to label rules jurisdictional in order to ensure their enforcement is evident in Justice Scalia’s dissent in *Gonzalez*: Scalia advocated treating § 2253(c)(3) as a jurisdictional requirement in part because he lacked confidence that the statute would in fact be treated as mandatory.²²³ A strict definition of mandatory rules—that is, as rules that require courts to respond to timely objections but are subject to waiver and forfeiture and do not require sua sponte monitoring—would resolve this concern.

B. Mandatory Rules: Examples

Mandatory-but-nonjurisdictional rules appear in a variety of legal contexts. Courts frequently refer to mandatory rules as “claim-processing rules” in the context of nonstatutory time-of-filing requirements.²²⁴ Mandatory rules that have received significant treatment include Federal Rule of Bankruptcy Procedure (FRBP) 4004, Federal Rule of Criminal Procedure (FRCrP) 33(b), and rules concerning personal jurisdiction. These rules comply with Dodson’s definition of “mandatory rules” and illustrate how mandatory rules operate.

FRBP 4004 is a straightforward example of a mandatory rule. It provides a sixty-day time limit for filing a plea objecting to a debtor’s discharge petition.²²⁵ In *Kontrick v Ryan*,²²⁶ the Court considered a case in which a debtor failed to object to the creditor’s untimely pleading under FRBP 4004 until after the bankruptcy court had decided the merits of the case.²²⁷ The debtor argued that the FRBP 4004 time limits were jurisdictional and could be raised at any time.²²⁸ The Court instead concluded that the time limits are “claim-processing rules,” subject to forfeiture if not raised before the bankruptcy court reaches the merits of a case.²²⁹ Based on this conclusion, the Court held that

not for claim-processing rules, but only for prescriptions delineating the classes of cases . . . falling within a court’s adjudicatory authority.” (quotation marks omitted).

²²³ *Gonzalez*, 132 S Ct at 658 (Scalia dissenting).

²²⁴ See, for example, *Kontrick*, 540 US at 454; *Eberhart*, 546 US at 13. But see *Bowles*, 551 US at 206–07, 210 (holding that the time limits for filing a notice of appeal are jurisdictional because they are imposed by statute).

²²⁵ FRBP 4004(a) (“In a chapter 7 case, a complaint, or a motion under § 727(a)(8) or (a)(9) of the Code, objecting to the debtor’s discharge shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a).”).

²²⁶ 540 US 443 (2004).

²²⁷ *Id* at 446.

²²⁸ *Id* at 447.

²²⁹ *Id* at 454, 456.

the debtor had forfeited his right to invoke FRBP 4004.²³⁰ In considering the case, the Court confirmed the existence of a category of “inflexible” claim-processing rules that are “unalterable on a party’s application,” though still subject to forfeiture and waiver.²³¹ Furthermore, although the case did not expressly address whether a court may raise timeliness under FRBP 4004 *sua sponte*, *Kontrick*’s treatment of the rule as an affirmative defense “may imply [that] courts cannot raise time bars in claim-processing federal rules” because “courts generally may not raise affirmative defenses *sua sponte*.”²³²

Like FRBP 4004, FRCrP 33(b) has been designated a “claim-processing rule” and provides a useful illustration of the way that mandatory rules function in practice. Rule 33(b) stipulates time limits for filing a motion for a new trial.²³³ In *Eberhart v United States*,²³⁴ the Court held that the Rule 33(b) time limit is nonjurisdictional.²³⁵ In holding that Rule 33(b) is instead a claim-processing rule, the Court noted that these rules “assure relief to a party properly raising them, but do not compel the same result if the party forfeits them.”²³⁶ In the case at bar, the Court held that because the Government had “failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense.”²³⁷ Scalia used the *Eberhart* decision in his *Gonzalez* dissent as an example of a mandatory rule that, in his view, “continued to have ‘bite’ even though it was held nonjurisdictional: [i]t prevented relief when the failure to observe it was properly challenged.”²³⁸ In addition to being subject to waiver and forfeiture, FRCrP 33(b) parallels Dodson’s definition of mandatory rules because district courts cannot order new trials *sua sponte* under FRCrP 33(b).²³⁹

The Supreme Court further elaborated on the nature of mandatory rules in *Eberhart* by clarifying the holding of an earlier case, *United States v Robinson*.²⁴⁰ In *Robinson*, the Court

²³⁰ *Kontrick*, 540 US at 447.

²³¹ *Id.* at 456.

²³² *United States v Mitchell*, 518 F3d 740, 745 (10th Cir 2008).

²³³ FRCrP 33(b).

²³⁴ 546 US 12 (2005).

²³⁵ *Id.* at 13.

²³⁶ *Id.* at 19.

²³⁷ *Id.*

²³⁸ *Gonzalez*, 132 S Ct at 658 (Scalia dissenting).

²³⁹ See *United States v Martinson*, 419 F3d 749, 752 (8th Cir 2005).

²⁴⁰ 361 US 220 (1960).

appeared to suggest that then-FRCrP 37, which prescribed the permissible time for taking an appeal, was “mandatory and jurisdictional.”²⁴¹ But as the *Eberhart* Court explained, *Robinson* is an example of the imprecise use of “the term ‘jurisdictional’ to describe emphatic time prescriptions” that are not truly jurisdictional.²⁴² The *Eberhart* Court clarified that *Robinson* instead simply held “that when the Government object[s] to a filing untimely under Rule 37, the court’s duty to dismiss the appeal [is] mandatory.”²⁴³ This is due not to a lack of subject-matter jurisdiction but to the fact that “district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked. This does not mean that limits . . . are not forfeitable when they are *not* properly invoked.”²⁴⁴ This description of a mandatory rule corresponds to Dodson’s definition of a mandatory rule as one that leaves the court no discretion to excuse noncompliance when “the rule is properly invoked.”²⁴⁵

In addition to these time-of-filing rules, one commentator has argued that personal jurisdiction can be conceptualized as a mandatory rule.²⁴⁶ Despite its “jurisdictional” label, personal jurisdiction lacks the defining characteristics of subject-matter jurisdiction.²⁴⁷ Rather, like the mandatory time limits discussed above, personal jurisdiction is subject to waiver, forfeiture, consent, and estoppel.²⁴⁸ But when a party raises the issue, the court must assess whether it has personal jurisdiction, and if it concludes that it does not, “it has no discretion to proceed to the merits.”²⁴⁹ Furthermore, various circuit courts have held that

²⁴¹ *Id.* at 224.

²⁴² *Eberhart*, 546 US at 18, quoting *Kontrick*, 540 US at 454.

²⁴³ *Eberhart*, 546 US at 18.

²⁴⁴ *Id.* at 17.

²⁴⁵ Dodson, 61 Stan L Rev at 9 (cited in note 207). See also *United States v Sadler*, 480 F3d 932, 934 (9th Cir 2007) (dismissing an appeal because “the government properly objected to the untimeliness of the appeal” pursuant to FRAP 4(b), the successor to FRCrP 37).

²⁴⁶ See Petty, 44 U Memphis L Rev at 17–19 (cited in note 209). For another example of an area to which scholars have attempted to extend the mandatory rule framework, see Dodson, 61 Stan L Rev at 18–34 & n 98 (cited in note 207) (arguing that the doctrine of state sovereign immunity should receive mandatory-but-nonjurisdictional treatment).

²⁴⁷ See *Williams v Life Savings and Loan*, 802 F2d 1200, 1202 (10th Cir 1986) (discussing the difference between subject-matter jurisdiction and personal jurisdiction).

²⁴⁸ See *Insurance Corp of Ireland v Compagnie des Bauxites de Guinee*, 456 US 694, 703–04 (1982).

²⁴⁹ Petty, 44 U Memphis L Rev at 18 (cited in note 209), citing *Sinochem International Co v Malaysia International Shipping Corp*, 549 US 422, 430–31 (2007).

courts should not raise personal jurisdiction *sua sponte* except in those limited cases where a default judgment is to be entered.²⁵⁰ Thus, personal jurisdiction has the characteristics of a mandatory rule as outlined by Dodson.

Collectively, these examples reveal the value of mandatory rules and confirm their essential characteristics. First, when a party properly invokes a mandatory rule, the court does not have discretion to disregard the challenge. Second, because a mandatory rule is subject to waiver and forfeiture, a party can lose the benefit of the rule should it fail to invoke the rule in a timely fashion. Finally, a mandatory rule generally should not be raised *sua sponte*.

C. A Mandatory Model for § 2253(c)(3)

Although the above examples are necessarily distinct from § 2253(c), they clarify the meaning of the mandatory-but-nonjurisdictional designation and shed light on the way such rules operate. Most importantly, they suggest that there are three key questions to consider in determining the appropriate treatment of defective COAs. First, should courts be obligated to address defects when the opposing party raises a proper challenge? Second, are challenges to the propriety of a COA subject to forfeiture and waiver? And third, should § 2253(c)(3) defects be raised *sua sponte*? This Section will consider and respond to each of these questions before turning to an explanation of the way in which a mandatory model maintains the textual force of the statute while simultaneously advancing the efficiency goals of the COA requirement articulated in *Gonzalez*.

1. Courts should be obligated to address timely challenges.

Both the mandatory rules discussed above and the language used in *Gonzalez* indicate that courts must address COA defects upon proper objection. This conclusion is consistent with the plain language of *Gonzalez*: “If a party timely raises the COA’s failure to indicate a constitutional issue, the court of appeals

²⁵⁰ See, for example, *Pilgrim Badge and Label Corp v Barrios*, 857 F2d 1, 3 (1st Cir 1988) (“[T]he caselaw appears uniform in concluding that a district court has no authority, *sua sponte*, to dismiss for lack of personal jurisdiction.”); *Williams*, 802 F2d at 1203 (“We hold that a district court may not dismiss an action *sua sponte* for lack of personal jurisdiction except when a default judgment is to be entered.”); *Kapar v Kuwait Airways Corp*, 845 F2d 1100, 1105 (DC Cir 1988).

panel *must* address the defect.”²⁵¹ A court may amend the COA or remand for specification of the issues, but it cannot simply proceed to the merits of the case. This approach preserves the mandatory nature of the rule and addresses the Eleventh Circuit’s concern for “the text enacted by Congress,”²⁵² as well as the Ninth Circuit’s concern for “the proper administration of § 2253(c).”²⁵³ Like the Supreme Court’s explanation in *Eberhart* that “district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked,”²⁵⁴ this treatment of § 2253(c)(3) establishes a minimum threshold of respect for the text of the statute.

This conclusion means that the Third Circuit’s refusal to further scrutinize the COA in *Sistrunk* is impermissible because the Government properly challenged the defect.²⁵⁵ This raises an interesting scenario because *Sistrunk* directly corresponds to the Supreme Court’s example in *Gonzalez* of a situation in which remand with instructions to correct a defective COA would be “particularly fruitless”: that is, when “the district court dismise[s] the petition on procedural grounds and the court of appeals affirms, without having to address the omitted constitutional issue at all.”²⁵⁶ While the *Gonzalez* Court’s statement appears to disfavor a rule that requires courts to remand COAs when they could easily dispose of cases on the merits, without such a rule, courts can proceed despite a proper objection, which, in Dodson’s words, “would render the ‘mandatory’ moniker meaningless.”²⁵⁷ While these two concepts appear to be in tension with one another, the baseline requirement that courts respond to timely challenges enforces the *Gonzalez* Court’s dicta, upholds the statutory command, and, when coupled with the other characteristics of a mandatory rule, may ultimately advance efficiency goals.²⁵⁸

²⁵¹ *Gonzalez*, 132 S Ct at 651 (emphasis added).

²⁵² *Spencer*, 733 F3d at 1138.

²⁵³ *Phelps*, 366 F3d at 728.

²⁵⁴ *Eberhart*, 546 US at 17.

²⁵⁵ *Sistrunk*, 674 F3d at 186.

²⁵⁶ *Gonzalez*, 132 S Ct at 650.

²⁵⁷ Dodson, 61 Stan L Rev at 9 n 41 (cited in note 207).

²⁵⁸ See Part III.C.4.

2. Challenges to defective COAs should be subject to waiver and forfeiture.

Although courts should be obligated to respond to proper challenges, untimely objections to defective COAs should be subject to waiver and forfeiture. The mandatory rules discussed above illustrate that such nonjurisdictional rules generally allow for waiver and forfeiture,²⁵⁹ and *Gonzalez* confirms this conclusion. In *Gonzalez*, the Court remarked that “[n]othing in § 2253(c)(3)’s prescription establishes that an omitted indication should remain an open issue throughout the case.”²⁶⁰ The Court also emphasized that defects must be addressed “[i]f a party *timely* raises the COA’s failure to indicate a constitutional issue.”²⁶¹ In addition to this clear language, past cases have permitted both waiver and forfeiture of COA defects. For example, in *Ingram*, the Government waived its objection to a defective COA and the Seventh Circuit accepted the waiver, remarking that “litigants may waive their procedural entitlements.”²⁶² And in *Dahler v United States*,²⁶³ the Seventh Circuit concluded that because the Government did not pursue a challenge to the defective COA and instead “filed a brief on the merits,” it forfeited “any entitlement to the protection of § 2253(c)(2).”²⁶⁴

Waivability and forfeitability are also consistent with the structure of AEDPA. The statute specifically institutes higher waiver standards for other rules that lie for the benefit of the government. For example, § 2254(b)(3) provides that “[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.”²⁶⁵ The fact that this type of specification was provided for some rules suggests that when the statute does *not* specify particular waiver or forfeiture rules, and the provisions are nonjurisdictional, Congress intended normal waiver and forfeiture rules to apply.²⁶⁶

²⁵⁹ See Part III.B.

²⁶⁰ *Gonzalez*, 132 S Ct at 651.

²⁶¹ *Id* (emphasis added).

²⁶² *Ingram*, 541 Fed Appx at 708.

²⁶³ 143 F3d 1084 (7th Cir 1998).

²⁶⁴ *Id* at 1087.

²⁶⁵ 28 USC § 2254(b)(3).

²⁶⁶ See, for example, *Sebelius v Cloer*, 133 S Ct 1886, 1894 (2013), quoting *Bates v United States*, 522 US 23, 29–30 (1997) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

Additionally, strong waiver and forfeiture doctrines address the efficiency concerns that informed the *Gonzalez* decision. Allowing the procedural protections of § 2253(c)(3) to be forfeited ensures that the government will raise any concerns related to the defective COA early in the litigation, preventing an unnecessary expenditure of resources in cases in which the party intends to challenge the defect and the case will be resolved on the basis of the defective COA rather than on the merits. For example, in *Gonzalez*, the challenge to the COA was not raised until the case came before the Supreme Court.²⁶⁷ This was permissible because the question at issue was related to jurisdiction, but the Supreme Court's holding that § 2253(c)(3) is nonjurisdictional suggests that challenges to defective COAs can no longer be raised at such a late hour.²⁶⁸ Instead, forfeiture likely takes place after the deadline for filing documents with the court of appeals has passed. In *Dahler*, for example, the court found that forfeiture occurred after the Government failed to object to the defective COA and instead "let the matter drop and filed a brief on the merits."²⁶⁹

It may be possible, however, for forfeiture to be tailored more narrowly to correlate with the expenditure of resources at the appellate level.²⁷⁰ This would advance the efficiency goals that motivated several of the pre-*Gonzalez* approaches and *Gonzalez* itself without jeopardizing the mandatory nature of the rules. For example, because both the *Gonzalez* Court and appellate courts looked to briefing as a benchmark of resource expenditure, a forfeiture rule requiring the government to challenge the COA *prior* to the filing of the merits briefs would be particularly beneficial.²⁷¹ While this briefing benchmark is more sensitive to the conservation of litigant resources than judicial resources, it provides a workable touchstone for the courts and

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

²⁶⁷ *Gonzalez*, 132 S Ct at 647.

²⁶⁸ *Id* at 656.

²⁶⁹ *Dahler*, 143 F3d at 1087.

²⁷⁰ See Dodson, 61 Stan L Rev at 31–32 (cited in note 207) (suggesting that the time limit for forfeiture can vary depending on the circumstances).

²⁷¹ This could likely be accomplished by the adoption of local rules establishing a specific deadline, prior to the briefing deadline, by which the government would have to raise any challenges to the COA. Consider Third Circuit Local Appellate Rule 27.4(b) (stating that "motions for summary action or dismissal should be filed before appellant's brief is due"); Fifth Circuit Local Appellate Rule 8.10 (requiring that inmates seeking stays of execution file "at least 7 days before the scheduled execution").

has been widely adopted. Furthermore, by the time courts have identified any COA challenges included in the merits briefs, they have presumably already reviewed and considered those briefs. Thus, a forfeiture rule that encourages the government to raise such challenges earlier in the litigation would indeed conserve judicial resources.

A robust efficiency rationale for forfeiture is appropriate in this context because there is no particular concern that permitting forfeiture will lead to unfairness. The government is the only party that will suffer the consequences of forfeiture, as only the government has any reason to challenge a defective COA. And because the government is a sophisticated, repeat player, the risk of unfairness or prejudice is quite low. A bright-line rule that allows the government to anticipate the risk of forfeiture will be sufficient to avoid any possible prejudice. Thus, there is significant latitude to use forfeiture as a mechanism to address the courts' efficiency concerns while preserving the mandatory nature of § 2253(c)(3).

3. Courts should not consider COA defects sua sponte.

Finally, the above mandatory rules, as well as the *Gonzalez* dicta, make clear that courts should not raise COA defects sua sponte.²⁷² To begin, it is important to acknowledge that the COA requirements serve the institutional goal of limiting the number, type, and scope of appeals. This differs somewhat from mandatory rules that lie for the benefit of the opposing party. For example, personal jurisdiction can be understood to derive from the Due Process Clause of the Fourteenth Amendment to the Constitution and to exist, at least in part, for the benefit of the defendant.²⁷³ In contrast, § 2253(c) effectuates Congress's desire to limit habeas appeals, rather than protect a particular individual right.²⁷⁴ This means that, at least at first glance, it may make sense to permit courts to raise COA defects sua sponte in order to further these institutional interests.

²⁷² See *Gonzalez*, 132 S Ct at 650 (expressing concern over “unfair prejudice resulting from [] *sua sponte* dismissals and remands”) (quotation marks omitted); *Martinson*, 419 F3d at 752 (noting that a district court “does not have the power under [FRCrP] 33 to order a new trial sua sponte”); *Pilgrim Badge and Label*, 857 F2d at 3 (“[T]he caselaw appears uniform in concluding that a district court has no authority, *sua sponte*, to dismiss for lack of personal jurisdiction.”).

²⁷³ See *Petty*, 44 U Memphis L Rev at 28 (cited in note 209).

²⁷⁴ See Part I.B.

But the fact that a rule serves institutional goals does not automatically indicate that sua sponte treatment is desirable. In fact, the holding in *Gonzalez* that § 2253(c)(3) is nonjurisdictional strongly suggests that the Court determined that sua sponte consideration was unnecessary. Indeed, the Court expressed concern that sua sponte consideration of defects could harm individuals who had done all that was required of them.²⁷⁵ Further, the Court commented that COA defects should not necessarily “remain an open issue throughout [a] case.”²⁷⁶ If a court were able to raise a COA defect sua sponte whenever it came to the court’s attention, the issue would in fact remain open indefinitely. Admittedly, limiting sua sponte consideration to the same prebriefing time period available to parties would address this concern. But such a sua sponte regime would nevertheless implicate the Court’s fairness concerns, as petitioners would suffer remand even when the government did not choose to challenge the COA. Thus, the tension between sua sponte treatment and the holding and language of the *Gonzalez* decision persists.

The conclusion that sua sponte review should not be used contradicts the Eleventh Circuit’s recent announcement in *Spencer* that the court will vacate defective COAs sua sponte.²⁷⁷ On the one hand, strict enforcement of the § 2253(c) requirements may have a strong ex ante efficiency rationale: if district courts know that defective COAs will be consistently remanded, they will be less likely to issue defective COAs in the first place,²⁷⁸ and the appellate court will ultimately be saved the resource expenditure that comes with consideration of defective COAs. On the other hand, permitting consideration of the merits of an appeal when the government fails to challenge a defective COA reaps at least some of the systemic efficiency gains of having an appellate court resolve open questions of law.²⁷⁹

²⁷⁵ *Gonzalez*, 132 S Ct at 650.

²⁷⁶ *Id* at 651.

²⁷⁷ *Spencer*, 773 F3d at 1137–38.

²⁷⁸ Various scholars have noted that judges are likely averse to reversal of their decisions and may tailor their decisions accordingly. See, for example, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 S Ct Econ Rev 1, 14 (1993); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L Rev 469, 477–78 (1998).

²⁷⁹ For example, by disregarding the defective COA in *Gonzalez*, the Court was able to resolve a circuit split regarding when a judgment becomes “final” under 28 USC § 2244(d)(1)(A) for a petitioner who does not seek review in a state’s highest court. See *Gonzalez*, 132 S Ct at 647 & n 2.

Therefore, the efficiency considerations related to sua sponte review cut both ways.

Furthermore, the Eleventh Circuit's emphatic concern for "the text enacted by Congress"²⁸⁰ ultimately gave way to efficiency considerations in both *Spencer* and *Damren*, as the court decided to reach the merits of both appeals in light of their extensive procedural journeys.²⁸¹ Thus, even the Eleventh Circuit seems unwilling to completely disregard the resource drain that a sua sponte remand might entail. And in light of the court's failure to heed its own warning, the ex ante efficiency rationale of sua sponte remand is significantly weakened. Accordingly, sua sponte evaluation of COAs is likely to be net inefficient. And while the Eleventh Circuit's assertion that defective COAs violate the text of the statute is formalistically true, it does not follow that sua sponte review is required. Rather, the Supreme Court's dicta in *Gonzalez* indicate that COA defects should not be raised sua sponte.

4. The mandatory model maintains the mandatory nature of § 2253(c) while also advancing the efficiency goals of the COA requirement.

The intermediate approach proposed by this Comment strikes a balance between the countervailing interests that arise with regard to defective COAs: adherence to the text of § 2253(c) and the Supreme Court's designation of § 2253(c)(3) as a mandatory rule on the one hand, and sensitivity to the efficiency goals that the COA was initially designed to promote on the other. The three key characteristics of mandatory rules identified by Dodson work in tandem to accomplish this goal.²⁸²

The lack of sua sponte review obviates the need for a court to address the propriety of the COA when it is easier to dispose of the case on the merits of the procedural or constitutional issues and the government raises no objection. This shields against "particularly fruitless" remands.²⁸³ Such scenarios will arise when the government does not have a particularly strong incentive to challenge the COA. For example, when the government is confident that the petitioner will not succeed on the

²⁸⁰ *Spencer*, 773 F3d at 1138.

²⁸¹ *Id.* at 1137; *Damren*, 776 F3d at 820–21.

²⁸² Dodson, 61 *Stan L Rev* at 11 (cited in note 207).

²⁸³ *Gonzalez*, 132 S Ct at 650.

merits of either the constitutional or the procedural issues, it may well opt to forgo a challenge to the COA because the court's resolution on the merits will be just as expedient. But such cases are likely quite rare. Given that 92 percent of COA rulings are denials,²⁸⁴ those petitioners that do receive a COA (even if defective) likely have some debatable issue—either a debatable procedural issue or an unspecified, debatable constitutional issue. And when, as in *Ingram*, the government concedes the strength of the petitioner's case, it may also forgo a challenge.²⁸⁵ This occurs because the appellate courts have the power to amend the COA as necessary. Therefore, the government gains little from challenging a COA if the petitioner has a strong merits case—it simply forces the court to explicitly amend the COA to specify that issue. These cases are also likely to arise only infrequently, as the high denial rate for habeas petitions suggests that strong merits claims are very rare. For these reasons, in cases in which the government does not object, the lack of sua sponte review and the availability of waiver facilitate efficient disposition of the case as envisioned in *Gonzalez*.

On the other hand, courts must respond to properly raised objections to defective COAs. While this requirement may occasionally lead to consideration of the COA when disposition on the merits would be more efficient, this small loss of efficiency is justified by the need to maintain the mandatory nature of § 2253(c) and is offset by the efficiency gains of mandatory treatment. Note that the mandatory approach maintains at least some of the benefits of more stringent enforcement of § 2253(c), because district courts still risk remand if they issue invalid COAs. And, more importantly, this approach will likely produce challenges in the one scenario in which consideration of defective COAs leads to a greater expenditure of judicial resources: when an appellate court is presented with a debatable procedural issue and, absent a mandatory regime, would reverse the lower court on the procedural issue and remand for further consideration—effectively reviving the petitioner's claim through a statutorily invalid appeal.²⁸⁶ It is in this type of

²⁸⁴ See King, 24 Fed Sent Rptr at 310 (cited in note 29).

²⁸⁵ See *Ingram*, 541 Fed Appx at 708 (“[T]his appeal contains [] a waiver. The prosecutor informs us that the United States is not standing on technicalities and consents to a remand.”).

²⁸⁶ See Part II.B.2. Note that this approach would also likely prevent unauthorized grants of relief to § 2255 petitioners, because the government has a particularly strong incentive to challenge defective COAs—that is, COAs specifying only statutory issues—

situation that proper administration of § 2253(c)(3) is particularly important.

Fortunately, this is the situation that is the most likely both to arise frequently and to generate the greatest number of government challenges. First, this subset of cases probably constitutes a substantial portion of cases involving defective COAs. As noted above, 92 percent of COA rulings are denials, and petitioners with very easily resolved procedural issues are unlikely to obtain COAs in the first instance. Therefore, COAs with obviously frivolous procedural issues are likely rare, and COAs with obviously viable constitutional claims will be equally rare. This suggests that the majority of defective COAs include a debatable procedural issue. Because of this, the government has a much stronger incentive to raise a challenge to these COAs than to the less debatable COAs discussed above. A COA certifying only a procedural issue will be easily recognizable; if the government is not confident that the court of appeals will affirm the district court's procedural ruling, it will likely raise a challenge to the COA in an effort to prevent a reversal of the district court's ruling and remand for further consideration of the case.²⁸⁷ For example, in *Thomas v Greiner*,²⁸⁸ the Government challenged the petitioner's COA because it specified only a statute of limitations issue.²⁸⁹ Despite the challenge, the circuit court reversed the district court's dismissal of the habeas petition as time-barred and remanded "for consideration of the merits of the petition."²⁹⁰ If the circuit court had applied the mandatory model to this case, however, it would have responded to the Government's challenge and remanded the COA to the district court to either identify a constitutional issue or deny the COA.²⁹¹ Therefore,

when there is a possibility that the circuit court will grant the writ on the basis of such a statutory claim. See, for example, *Dahler*, 143 F3d at 1089.

²⁸⁷ The fact that several of the cases discussed in Part II.A involved government challenges despite consistently resulting in affirmation of district courts' denial of the writ suggests that the government will often challenge defective COAs, as it may be difficult to judge with certainty the outcome of a specified procedural issue. See generally *Sistrunk*, 674 F3d 181; *Keeling*, 673 F3d 452.

²⁸⁸ 174 F3d 260 (2d Cir 1999).

²⁸⁹ *Id.* at 261.

²⁹⁰ *Id.*

²⁹¹ It is likely that if the COA had been remanded, the district court would have denied the COA for lack of a substantial constitutional issue. Instead, on remand the district court denied the habeas petition in part on other procedural grounds and in part on the merits of the constitutional claim. See *Thomas v Greiner*, 111 F Supp 2d 271, 272–73 (SDNY 2000).

implementing a mandatory model of § 2253(c)(3) will frequently be effective in responding to those circumstances in which defective COAs are most problematic.

Finally, the possibility of forfeiture prevents excessively inefficient vacatur of COAs. For example, in circumstances such as the *Spencer* case—those in which the court and the litigants have already expended a great deal of resources²⁹²—the government’s ability to challenge a COA will be forfeited early in the litigation, preventing a delayed challenge that would render the expenditure useless. Ultimately, an approach that forgoes sua sponte review but requires consideration of timely government objections strikes a balance between preserving § 2253(c)(3)’s mandatory nature and advancing the statute’s efficiency goals.

D. Applying the Mandatory Model to § 2253(c)(3)

The mandatory model proposed in this Comment sets out a straightforward inquiry to determine what action, if any, must be taken with regard to an allegedly defective COA in a habeas appeal. First, the court must determine whether the government has raised a challenge to the COA. If not, the inquiry ends, the COA receives no scrutiny, and the appeal proceeds. If the government has acknowledged the presence of a defect in the COA but has expressly waived the issue, the court similarly proceeds with the appeal.²⁹³ But if the government *has* raised a challenge to the COA, the court must determine whether the challenge is timely and proper. In other words, the court must examine whether the government has forfeited its ability to challenge the COA. This inquiry will depend on the court’s rules regarding the time and manner for raising such challenges.

One possible timing regime requires that the government raise COA challenges in a motion to dismiss filed prior to the briefs on the merits. The Sixth Circuit alluded to this regime in *Rayner* when it declined to consider the Government’s challenge to a COA because “it should have raised this issue on a motion to dismiss.”²⁹⁴ Such a timing rule relies on merits briefing as a

²⁹² See *Spencer*, 773 F3d at 1137–38.

²⁹³ See, for example, *Ingram*, 541 Fed Appx at 708.

²⁹⁴ *Rayner*, 685 F3d at 635 n 1. See also *Porterfield v Bell*, 258 F3d 484, 485 (6th Cir 2001) (considering a COA challenge raised in a motion to dismiss); *Young v United States*, 124 F3d 794, 799 (7th Cir 1997) (“Perhaps a motion to dismiss an appeal on the ground that a certificate was improperly issued would serve some function.”); Third

benchmark for resource expenditure, consistent with many circuits' pre-*Gonzalez* approaches and with the language of *Gonzalez* itself. In applying this type of regime, the court need only identify the time at which the government raised its challenge. If the government raised the COA's defect for the first time in its brief on the merits, it forfeited the objection and the court must proceed to the merits of the appeal. If, however, the government raised its challenge in a timely motion to dismiss, the challenge is proper and the court must respond to the challenge. The court will first consider whether the COA is in fact defective under § 2253(c)(3). If it is defective, the court will then choose the most appropriate remedial action. Often, the circuit court itself will be able to remedy the defect by amending the COA. Alternatively, the circuit court may remand to permit the district court to remedy the defect or, if the COA was not warranted in the first instance, to vacate the COA.²⁹⁵

To further illustrate how the mandatory model would work in practice, consider how it would apply to *Sistrunk*. First, imagine a circuit that provides that challenges to COAs may be raised in the merits brief but that any challenges raised after that point will be forfeited. When the mandatory model is applied to *Sistrunk* with this qualifying rule, it results in an outcome that differs from that reached by the Third Circuit. In *Sistrunk*, the Government raised a challenge to the COA in its merits brief, but the Third Circuit proceeded to decide the case on the merits despite the challenge.²⁹⁶ If the court had applied the mandatory model instead, it would have determined that the challenge was timely. Thus, the court would have been obligated to consider the propriety of the COA, and given that the COA specified only a procedural issue,²⁹⁷ it would have vacated the COA and remanded the case to the district court. The district court would then have made the requisite inquiry into the presence of a substantial showing of the denial of a constitutional

Circuit Local Appellate Rule 27.4(b) (“[M]otions for summary action or dismissal should be filed before appellant’s brief is due.”).

²⁹⁵ See *Porterfield*, 258 F3d at 485 (denying the State’s motion to dismiss but remanding to the district court to allow it to make the determinations required under § 2253(c)).

²⁹⁶ *Sistrunk*, 674 F3d at 186. In deciding the case on the merits, the court dedicated approximately six pages to a discussion of *Sistrunk*’s equitable tolling arguments. The mandatory model, coupled with a timely government challenge, would have prevented this expenditure of judicial resources.

²⁹⁷ See *id.*

right and would have either denied the COA or specified the constitutional issue in a proper COA.

Note, however, that this result changes if the circuit rules require that COA challenges be raised in a motion to dismiss filed *prior* to the filing deadline for the merits briefs. With this forfeiture regime in place, the court in *Sistrunk* would have proceeded to the merits of the procedural issue specified in the COA, because the Government's challenge to the COA—included in its merits brief—would have been untimely. Of course, if a predictable forfeiture regime were established, the government would be on notice of the filing deadline and a properly asserted challenge prior to the filing of the merits briefs would reduce the resources expended on the appeal. Thus, such a timing rule is superior to a rule that permits challenges to be made in the merits brief because it prevents futile preparation and review of the briefs in circumstances where the defective COA will be dispositive. When applied correctly, the mandatory model has the potential to promote the efficiency goals of the COA requirement while respecting the Supreme Court's designation of § 2253(c)(3) as a mandatory-but-nonjurisdictional rule.

CONCLUSION

AEDPA's COA requirement is a significant obstacle for a petitioner seeking review of the denial of his habeas petition, and courts have struggled with the many procedural questions that the requirement raises. The question of how to treat defective COAs persists despite the Supreme Court's resolution of a related circuit split in *Gonzalez*. The circuits currently take remarkably divergent approaches to treatment of defective COAs. The Third and Sixth Circuits appear to disregard government challenges to COA defects, while the Eleventh Circuit has announced that it will review the propriety of COAs *sua sponte*. Each of these approaches undermines both the *Gonzalez* decision and the text of § 2253(c)(3).

This Comment proposes a solution to the disagreement among the circuit courts by recommending an intermediate approach that treats § 2253(c)(3) as a mandatory rule. An examination of other mandatory rules reveals that this characterization has three consequences. First, courts of appeals will be obligated to address defective COAs when presented with a timely and proper challenge. Second, challenges to COAs will be both waivable and forfeitable. And third, courts of appeals will

not raise COA defects sua sponte. This approach permits courts to avoid inefficient review of COAs when the government does not challenge the COA, but it maintains the mandatory nature of the rule and ensures enforcement of the statute. Ultimately, this proposal preserves the integrity of the mandatory characterization, the text of the statute, and the *Gonzalez* decision, while also advancing the efficiency goals of the COA requirement.