No. 03-9627

In The
Supreme Court of the United States

JOHN A. PACE,

Petitioner,

v.

DAVID DiGUGLIELMO, Superintendent,
State Correctional Institution at Graterford,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT[1]

I. STATUTORY TOLLING IS APPROPRIATE.

Petitioner's Post-Conviction Relief Act ("PCRA") petition was "properly filed." *See* Pet. Br. Arg. § I, discussing, *inter alia*, 28 U.S.C. § 2244(d)(2) and *Artuz v. Bennett*, 531 U.S. 4 (2000). The PCRA time-bar functions in all material ways like the procedural bars addressed in *Artuz* – *e.g.*, no precondition on filing; ordinary judicial review, including appellate review; claim-by-claim operation; availability of relief on the merits in some cases. *See* Pet. Br. at 22-29.[2]

A. Respondent says the PCRA time-bar "works in the same manner," Resp. Br. at 28, as AEDPA's pre-filing procedure for successive habeas petitions, 28 U.S.C.

[1] All emphasis herein is supplied unless otherwise indicated. The Joint Appendix and the Appendix to Petitioner's Brief are cited as "JA" and "App." The briefs for Petitioner, Respondent and the *amici* State of Alabama, *et al*., are cited as "Pet. Br.," "Resp. Br." and "Ala. Br."

[2] As *Artuz* explained, the claim-by-claim operation of a state court procedural bar rule is significant because § 2244(d)(2) "refers only to 'properly filed' *applications* and does not contain the peculiar suggestion that a single *application* can be both 'properly filed' and not 'properly filed' " when some *claims* in the application might be barred and some might not. *Artuz*, 531 U.S. at 9-10. Respondent essentially asks this Court to overrule *Artuz*, asserting that *Artuz*'s distinction between "application" and "claim" is illusory because § 2244(d)(2) refers to a "properly filed application . . . with respect to the pertinent judgment or claim." *See* Resp. Br. at 24-25. But § 2244(d)(2)'s use of "judgment or claim" accounts only for the fact that AEDPA's limitations period starts on different dates – it usually starts on "the date on which the *judgment* became final," § 2244(d)(1)(A), but it may start later for some claims if one of the triggers in § 2244(d)(1)(B-D) occurs. In either context, § 2244(d)(2) refers to a "properly filed *application*" not, as Respondent suggests, an "application" containing a "properly filed" "claim."

§ 2244(b)(3).[3] This Court identified § 2244(b)(3)'s pre-filing requirement as a paradigmatic "condition to filing" in *Artuz*, 531 U.S. at 9. The differences between § 2244(b)(3)'s pre-filing requirement and the PCRA time-bar highlight that the PCRA time-bar is *not* a "condition to filing" and does *not* "work[ ] in the same manner" as AEDPA's pre-filing rule.

First, under AEDPA, filing a successive habeas petition requires *pre-approval* from the court of appeals under § 2244(b)(3). There is no such pre-condition or barrier to filing a PCRA petition, which can be filed at any time. *See* Pet. Br. at 25.[4]

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[3] Section 2244(b)(3) states in pertinent part:

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> * * *
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

[4] Respondent says § 2244(b)(3) allows the court of appeals to examine the claims in the proposed habeas petition to determine if it will allow the petition to be filed. *See* Resp. Br. at 23-25, 28. But Respondent ignores the fact that the "condition to filing" embodied in § 2244(b)(3) is the *court of appeals' approval* – once the court of appeals allows a petition to be filed, the entire petition by definition is "properly

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Second, AEDPA's pre-filing requirement is a true "gatekeeping" or "screening" device. *Felker v. Turpin*, 518 U.S. 651, 657, 664 (1996). The court of appeals filters out habeas petitions that do not make a "prima facie showing" of eligibility for relief, *see* § 2244(b)(3)(C), thus prohibiting them from being filed at all. If the court of appeals finds that the petition survives this prima facie screening, it permits the petition to be filed and leaves it to the district court to make an actual ruling on the merits. *See* § 2244(b)(4) ("district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section"). The PCRA has no such "screening" or "gatekeeping" mechanism.

Third, AEDPA's pre-filing determination is made quickly – the court of appeals must decide whether to authorize filing a habeas petition within 30 days, *see* § 2244(b)(3)(D), and there is no appeal, rehearing or certiorari from the court of appeals' decision, *see* § 2244(b)(3)(E). In contrast, under the PCRA there are several procedures in the Court of Common Pleas (*e.g.*, appointment of counsel, briefing, arguments, hearings); then proceedings on appeal (*e.g.*, appeal as of right in the intermediate appellate court and further discretionary review in the state supreme court); and the state courts can take years before ultimately ruling whether the petition is timely or not.[5]

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filed." Moreover, the court of appeals may specify which claims it finds appropriate to go forward.

[5] *See Commonwealth v. Cruz*, 852 A.2d 287, 289-91 (Pa. 2004) (petition filed in July 2000; dismissed as untimely by trial court in

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These differences highlight that the PCRA time-bar acts neither as a "screening mechanism designed to ensure that the action is properly commenced," Resp. Br. at 28, nor as a "kind of 'pre-filing'" requirement, Resp. Br. at 35.

B. Respondent emphasizes the "jurisdictional" label the Pennsylvania Supreme Court ultimately gave the PCRA time-bar. *See* Resp. Br. at 4-5, 7, 9-10, 12-18, 25-28, 35. But the only effects of this label are: (1) the state courts no longer provide non-statutory exceptions to the time-bar; and (2) the state courts may raise the time-bar *sua sponte*. *See* Resp. Br. at 14. Neither effect makes the PCRA time-bar a condition to filing. Further, the PCRA's "waiver" provisions, which Respondent agrees are *not* conditions to filing, *see* Resp. Br. at 10, now are given the same two effects by Pennsylvania's courts.[6]

February 2001; untimeliness ruling affirmed by Superior Court in February 2002; remanded for evidentiary hearing on timeliness by Pennsylvania Supreme Court in June 2004); *Commonwealth v. Robinson*, 837 A.2d 1157, 1159-60 (Pa. 2003) (petition filed in July 1999; dismissed as untimely by trial court in August 1999; reinstated as timely by trial court in February 2000; found timely by Superior Court in July 2001; dismissed as untimely by Pennsylvania Supreme Court in October 2003); *Commonwealth v. Williams*, 828 A.2d 981, 982-87 (Pa. 2003) (petition filed in January 1997; trial court held "extensive hearings" on merits of claims, then dismissed as untimely in December 2001; found timely by Pennsylvania Supreme Court in July 2003); *Commonwealth v. Fenati*, 748 A.2d 205, 206-07 (Pa. 2000) (petition filed in January 1997; trial court held evidentiary hearing and ruled on merits; Superior Court dismissed as untimely; Pennsylvania Supreme Court found timely); *Commonwealth v. Lambert*, 765 A.2d 306, 316-23 (Pa.Super. 2000) (trial court held weeks-long evidentiary hearing on merits of claims, addressed all claims on merits in lengthy opinion and did not apply time-bar; Superior Court found all claims untimely).

[6] *See Commonwealth v. Bracey*, 795 A.2d 935, 941 (Pa. 2001) ("we now require strict adherence to the statutory language of the PCRA, and will afford post-conviction review only where a petitioner shows

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C. Respondent and his *amici* claim support from *Carey v. Saffold*, 536 U.S. 214 (2002). *See* Resp. Br. at 27-28; Ala. Br. at 8-10. But *Saffold* said nothing about the meaning of "properly filed" – it held that there may be nothing "*pending*" during a gap between state court proceedings when nothing is filed in a state court. *See* Pet. Br. at 32-33. In *Saffold*, the *State agreed with Petitioner here* that a post-conviction application ultimately deemed untimely by the state courts is nevertheless "properly filed" throughout the time the application is before a state court awaiting a decision – at least when, as in Pennsylvania, the petitioner can file the application at any time and the state court reviews it for timeliness. *See Carey v. Saffold*, No. 01-301, Reply Brief, 2002 WL 221020, *6 n.2 (U.S. Feb. 8, 2002).

D. Respondent offers a different definition of "file" – *i.e.*, "to commence a lawsuit," Resp. Br. at 17 (quoting Black's Law Dictionary (7th ed. 1999) – than that used in *Artuz*, 531 U.S. at 8 ("[t]o deliver a legal document to the

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that the statutory exceptions to waiver in the PCRA apply"); *Commonwealth v. Davis*, 573 A.2d 1101, 1105 (Pa.Super. 1990) ("The fact that the question of waiver has not been raised by the Commonwealth or the PCRA court does not foreclose this Court from doing so *sua sponte*.").

Respondent also refers to the PCRA's restrictions on stays of execution. *See* Resp. Br. at 26 & n.12 (quoting *Commonwealth v. Morris*, 771 A.2d 721 (Pa. 2001)). But these restrictions arise from specific anti-stay language in the PCRA, *see* 42 Pa.C.S. § 9545(c)(2) ("no stay may be issued unless a petition for postconviction relief which meets all the requirements of this subchapter has been filed"), not from the "jurisdictional" label ultimately given the time-bar. As the Pennsylvania Supreme Court noted in a passage omitted from Respondent's *Morris* quotation, "the legislature intended that in order for a stay to be granted, the underlying petition must *also* meet the pleading and proof requirements as set forth in 42 Pa.C.S. § 9543," *Morris*, 771 A.2d at 734 n.14, which are *not* jurisdictional, *see* Resp. Br. at 10 & n.2, 12-13.

court clerk or record custodian for placement into the official record"). Petitioner's PCRA petition was "properly filed" under *Artuz*. It was also "properly filed" under Respondent's definition. Using the ordinary meaning of "to commence a lawsuit," a PCRA petition is "properly filed" when it is sufficient to "commence" a PCRA proceeding. Surely, Petitioner's PCRA petition was "properly filed" in this sense – it did everything needed to "commence" a PCRA proceeding.[7] It would be strange to say PCRA proceedings never "commenced" because the appellate court eventually denied relief on time-bar grounds, years after the petition was filed and "commence[d the] lawsuit."[8]

E. Respondent and his *amici* suggest using "stay-and-abeyance" to accommodate the premature, protective

[7] As Respondent notes, *see* Resp. Br. at 18 & n.6, when Petitioner filed his PCRA petition the rule governing "commencement" of a PCRA proceeding was Pa. R. Crim. P. 1501 (West 1997) (set forth at App. 10): "A proceeding for post-conviction collateral relief shall be initiated by filing a motion and 3 copies with the clerk of the court in which the defendant was convicted and sentenced." Respondent does not dispute that Petitioner satisfied this commencement rule. *See* JA184-194; Pet. Br. at 8, 27-28; *see also Commonwealth v. Crews*, 863 A.2d 498, 501 (Pa. 2004) (stating that before December 1999 decision in *Commonwealth v. Beasley*, 741 A.2d 1258 (Pa. 1999), it was not clear that exceptions to time-bar had to be pled in PCRA petition).

[8] In *Commonwealth v. Pursell*, 749 A.2d 911 (Pa. 2000), as here, the trial court denied the PCRA claims as "previously litigated or waived" without applying a time-bar; the appellate court then affirmed on the ground that the claims were untimely, leaving "no jurisdiction to *grant Appellant relief*." *Id*. at 913-14; *cf*. *Artuz*, 531 U.S. at 11 ("condition to *obtaining relief"*). The Pennsylvania Supreme Court nevertheless confirmed that the petitioner "commenced" PCRA proceedings by filing his PCRA petition: "The present round of appeals *commenced* when Appellant, on June 4, 1999, filed" his PCRA petition. *Pursell*, 749 A.2d at 912.

federal habeas filings petitioners must make under Respondent's approach or else risk losing all federal review because of a state court time-bar ruling. *See* Resp. Br. at 35-37; Ala. Br. at 16-17.[9] In *Duncan v. Walker*, 533 U.S. 167 (2001), this Court warned against interpretations of "properly filed" that discourage full exhaustion in state court before filing for federal habeas relief.[10] At any rate, stay-and-abeyance would do nothing to alleviate the unfairness to Petitioner – who pursued state remedies when the Third Circuit *did not allow* stay-and-abeyance. *See* Pet. Br. at 31; *Slutzker v. Johnson*, 393 F.3d 373, 385 (3d Cir. 2004) (before the 2004 decision in *Crews v. Horn*, 360 F.3d 146 (3d Cir.), "the law of this Circuit did not yet allow [a petitioner] to stay his pending habeas corpus petition" during exhaustion).

F. Respondent says Petitioner's reading of "properly filed" provides "incentive for delay." Resp. Br. at 32. The state in *Artuz* made the same argument. *See Artuz v. Bennett*, No. 99-1238, Petitioner's Brief, 2000 WL 821138, *7-*25, *36-*37 (U.S. June 22, 2000). This Court held such

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[9] Pennsylvania and state *amici* have opposed this same stay-and-abeyance procedure in other cases before this Court. *See Rhines v. Weber*, No. 03-9046, Brief of Amici Curiae States, 2004 WL 2430213 (U.S. Oct. 25, 2004); *Duncan v. Walker*, No. 00-121, Brief Amicus Curiae of Massachusetts, *et al*., 2001 WL 22911, *25-*26 (U.S. Jan. 8, 2001).

[10] *See Duncan*, 533 U.S. at 180 ("properly filed" should be interpreted to assure that "§ 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts"); *id*. (interpretations of "properly filed" should not create a "diminution of statutory incentives to proceed first in state court"); *id*. at 181 ("properly filed" should be interpreted in light of "AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review" and to "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions") (emphasis in original).

"policy arguments" irrelevant in light of § 2244(d)(2)'s statutory language. *Artuz*, 531 U.S. at 10.

Moreover, in non-capital cases like this one, a "prisoner's principal interest . . . is in obtaining speedy federal relief." *Rose v. Lundy*, 455 U.S. 509, 520 (1982). For the rare prisoner who is truly vexatious, the state court can always impose an actual pre-filing requirement, as this Court noted in *Artuz*, 531 U.S. at 8-9 (citing *Martin v. District of Columbia Court of Appeals,* 506 U.S. 1 (1992)). *See also* Pet. Br. at 23 & n.14.

If death-sentenced prisoners have an interest in delay, it is not served by filing untimely PCRA petitions. Pennsylvania law requires the Governor to set an execution date for within 150 days after completion of direct appeal; if that date is stayed, the Governor must set a new execution date for within 90 days after the stay is lifted. *See* 42 Pa.C.S. § 9711(i); 61 P.S. § 3002. Further, as Respondent's Brief shows, a PCRA court *cannot issue a stay* unless it finds the prisoner's claims to be *both timely and meritorious*. *See Morris*, 771 A.2d at 734-35 (cited in Resp. Br. at 26 n.12). Only a prisoner with a death wish would seek "delay" through a PCRA petition s/he knew to be untimely.

Tolling during the time it takes the state courts to decide whether claims are timely is in keeping with *Artuz* and simple fairness.

II. EQUITABLE TOLLING IS APPROPRIATE.

A. Respondent says Petitioner cannot have equitable tolling because he was not litigating in 1992-96, *before there was a limitations period* either in Pennsylvania or in the federal habeas courts. *See* Resp. Br. at 39-41. Respondent

thus attempts to penalize Petitioner for not filing when he had no duty to file, even though Respondent raised no laches or other "delay" issue in the state court when Petitioner filed in 1996, and even though the state post-conviction judge also raised no "delay" issue. Respondent also seeks to penalize Petitioner for filing in the Pennsylvania courts, rather than the federal habeas court, at a time when Third Circuit law required him to seek remedies in the Pennsylvania courts.

Petitioner filed when he had a duty to file, in the court where the law told him to file. This is not a petitioner who wanted to delay resolution of his case. To the contrary, Petitioner was sentenced to life imprisonment when he was seventeen years old; he was uneducated, barely literate and ill-prepared to deal with the law. *See*, *e.g.*, JA20, JA35, JA37, JA89, JA308, JA340-341. To be sure, it took time for him to educate himself and learn how to make meaningful *pro se* arguments. *Compare* JA147, *et seq*. (1992 *pro se* filing), with JA184, *et seq*. (1996 *pro se* filing). Along the way, his progress was hampered by lack of communication with counsel during the brief period when he was represented, *e.g.*, JA238-39; limited access to a law library, *e.g.*, JA239; and a prison riot that resulted in the destruction of his case-related papers, *e.g.*, JA320-321, JA323. Petitioner acted reasonably under the law in effect at the time of his litigation. At the least, an evidentiary hearing at which Petitioner could prove the facts establishing that he acted reasonably would be appropriate before a court could accept Respondent's invitation to penalize Petitioner.

B. Respondent does not question Petitioner's description of Pennsylvania decisional law holding that the PCRA's statutory bar rules traditionally were overcome

when a petitioner asserted that all prior counsel, including prior post-conviction counsel, were ineffective; or that denial of relief would be a "miscarriage of justice" as defined by the Pennsylvania courts; or that there was a claim challenging the legality of the sentence. *See* Pet. Br. at 6, 18-19, 36-39. Nor does Respondent dispute that Petitioner invoked these traditional bar-overcoming rules in his PCRA proceedings and argued that they should overcome the PCRA time-bar, as they had overcome other PCRA procedural bar rules. *See* Pet. Br. at 9-10, 12-15, 18-19, 37-39. Respondent asserts, however, that Petitioner somehow should have realized the PCRA "time limit was not like existing procedural bars" because it "was jurisdictional" and, thus, "the courts were without power to disturb the legislative scheme." Resp. Br. at 46; *see also id*. at 7, 12-15, 47.

When Petitioner filed his PCRA petition, he had no reason to expect that the Pennsylvania Supreme Court would eventually deem the PCRA time-bar "jurisdictional," rather than an ordinary statute of limitations. The PCRA time-bar, 42 Pa.C.S. § 9545(b), looks like an ordinary statute of limitations, not a jurisdictional rule. It does not label the time-bar "jurisdictional" or use other language associated with jurisdiction. Indeed, Respondent says the PCRA time-bar "closely tracks," "closely parallel[s]" and is "similar to" AEDPA's limitations provision, 28 U.S.C. § 2244(d), which Respondent acknowledges to be a *statute of limitations rather than a jurisdictional requirement*, *see* Resp. Br. at 7-8, 11-12, 22, 23, 24, 27, 29, 31, 32, 33, 37.

Pennsylvania's rules of statutory construction also suggest the PCRA time-bar is not jurisdictional. Pennsylvania presumes that legislative acts do not decrease a court's jurisdiction, and Pennsylvania statutes are read as

limiting jurisdiction only when there is an "unequivocal" and "clear legislative mandate," which does not exist here.[11] Moreover, construing the PCRA time-bar as jurisdictional is "particularly inappropriate in a statutory scheme," like the PCRA, where *pro se* litigants "initiate the process." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).

Respondent says the PCRA "explicitly designates its time limit as a jurisdictional requirement." Resp. Br. at 7. That is not accurate. Section 9545 of the PCRA (set forth at App. 5) is captioned "Jurisdiction and proceedings," but only parts a and c(1) of § 9545 use jurisdictional language.[12] The time limit is in part b, which has *no "jurisdictional" language*. Neither do parts c(2)-(3) (governing stays of execution and special "limitations periods" for capital cases), or part d (governing evidentiary hearings) use jurisdictional language.[13] In this light, it is surprising

[11] *See* 1 Pa.C.S. § 1928(b)(7) (statutory provisions "shall be strictly construed" against "decreasing the jurisdiction of a court of record"); *Commonwealth v. Barfod*, 50 A.2d 36, 39 (Pa.Super. 1946) ("Only upon the showing of a clear legislative mandate, will courts hold that subsequent legislation decreases the existing jurisdiction of a court of record."); *Jones v. W.C.A.B.*, 612 A.2d 570, 573 (Pa.Cmwlth. 1992) ("If the legislature's intent to limit jurisdiction is not clear, we should construe the act in question as imposing no limitation."), *aff'd*, 645 A.2d 209 (Pa. 1994) (per curiam); *In re Kerr*, 481 A.2d 1225, 1228 (Pa.Super. 1984) ("Absent an unequivocal expression from the Legislature that loss of jurisdiction follows from a violation of the statute, we are unwilling to so declare.").

[12] Part a ("Original jurisdiction") sets forth a jurisdictional requirement by using the word "jurisdiction" and using language typically associated with jurisdiction ("No court shall have authority"). Part c(1) suggests a jurisdictional rule by using the phrase "No court shall have the authority."

[13] It is not unusual for one section of a statute to contain both jurisdictional provisions and a statute of limitations. As Respondent

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indeed that the Pennsylvania Supreme Court ultimately said the PCRA time-bar is "jurisdictional."[14]

Even if it had been apparent that the PCRA time-bar would be labeled "jurisdictional," it was still reasonable to expect it would be trumped by Pennsylvania's court-made bar-overcoming rules, because Pennsylvania's courts ordinarily allow court-made exceptions to overcome *jurisdictional* time limits.[15] Indeed, in *Commonwealth v.*

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says (*see* Resp. Br. at 28 & n.13), AEDPA's § 2244 has jurisdictional provisions in part b and a statute of limitations in part d. *See also* 28 U.S.C. § 2255 (post-conviction remedies for federal prisoner, placing original jurisdiction in district court and imposing one year statute of limitations); 42 U.S.C. § 2000e-5 (Title VII of Civil Rights Act of 1964, placing original jurisdiction in district court, part f(3), and imposing 180 day statute of limitations, part e), discussed in *Zipes*, 455 U.S. at 393-94. Similarly, the PCRA's "waiver," "previously litigated" and "laches" provisions, 42 Pa.C.S. § 9543(a)(3) & (b), which Respondent admits are non-jurisdictional, *see* Resp. Br. at 10 & n.2, 12-13, are in the same section as the "custody" requirement, § 9543(a)(1), which is jurisdictional, *see Commonwealth v. Ahlborn*, 683 A.2d 632, 637-41 (Pa.Super. 1996) (en banc), *aff'd*, 699 A.2d 718 (Pa. 1997). The pre-1996 PCRA's § 9545, also entitled "Jurisdiction and proceedings," contained jurisdictional provisions in part a and non-jurisdictional ones in part b. *See* 42 Pa.C.S. § 9545, Historical and Statutory Notes, set forth at App. 8.

[14] *See also* Pet. Br. at 42 n.30 (citing and quoting authorities); *Lambert v. Blackwell*, 134 F.3d 506, 518, 522-24 (3d Cir. 1998) (viewing PCRA time-bar as a traditional "statute of limitations," not a "jurisdictional" rule); *Peterkin v. Horn*, 30 F.Supp.2d 513, 519 (E.D. Pa. 1998) (same); *Peterson v. Brennan*, 1998 WL 470139, *5-*6 (E.D. Pa. Aug. 11, 1998) (same); *Hammock v. Vaughn*, 1998 WL 163194, *3, *5 (E.D. Pa. April 7, 1998) (same); *Morris v. Horn*, 1998 WL 150956, *2-*3 (E.D. Pa. March 19, 1998) (same); *Williams v. Vaughn*, 3 F.Supp.2d 567, 573-74 (E.D. Pa. 1998) (same); *Beasley v. Fulcomer*, 1997 WL 698178, *3 n.3 (E.D. Pa. Nov. 6, 1997) (same).

[15] *See* Pet. Br. at 42 n.30; *Cook v. U.C.B.R.*, 671 A.2d 1130, 1131-32 (Pa. 1996); *McKean County Animal Hosp. v. Burdick*, 700 A.2d 541, 543

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Peterkin, 722 A.2d 638 (Pa. 1998), when the Pennsylvania Supreme Court first called the PCRA time-bar jurisdictional, it also suggested the time-bar could be trumped by two of the bar-overcoming rules that Petitioner relied upon – "miscarriage of justice" and "illegality of sentence." *See* Pet. Br. at 40-41 (discussing *Peterkin*); *see also id*. at 38-39 & n.28 (citing Pennsylvania cases holding that "courts never relinquish their jurisdiction to correct an illegal sentence"). It was only in *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999), that it became clear that the Pennsylvania Supreme Court would abandon its traditional practice of providing court-made exceptions to statutory bars and treat the statutory language of the PCRA time-bar as the last word. *See* Pet. Br. at 41-42.

C. Respondent calls Petitioner's description of Third Circuit exhaustion law "bunkum," Resp. Br. at 48, but does not dispute that: (1) the Third Circuit requires exhaustion if there is any chance the state courts will address the merits, even if that is unlikely, *see* Pet. Br. at 34-35; (2) the Third Circuit first found the PCRA time-bar's statutory language controlling on the exhaustion issue in March 2000, *after* Petitioner already was in federal court, *see* Pet. Br. at 45, discussing *Lines v. Larkins*, 208 F.3d 153 (3d Cir. 2000); (3) while Petitioner was in state court, the Third Circuit and Pennsylvania's federal district courts required Pennsylvania prisoners to exhaust even when their claims appeared to be procedurally barred by the PCRA's statutory language, *see* Pet. Br. at 42-45, discussing *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996), *Banks v. Horn*, 126 F.3d 206 (3d Cir. 1997), *Lambert v. Blackwell*, 134 F.3d 506

(Pa.Super. 1997); *Tarlo v. Univ. of Pitt.*, 443 A.2d 879, 880 (Pa.Cmwlth. 1982).

(3d Cir. 1998), and district court cases; and (4) the District Judge here expressly found that he would have dismissed a habeas petition and required Petitioner to do what he did – exhaust his claims in state court, *see* Pet. Br. at 2, 18-19, 21, 35, 47.[16]

[16] Respondent tries to question Petitioner's description of the Third Circuit's decisions in *Doctor*, *Banks* and *Lambert*. *See* Resp. Br. at 48-49. Respondent believes *Doctor* inapposite because Doctor "came to federal court a year before" the PCRA time-bar was enacted. Resp. Br. at 48-49. But *Doctor* was not about the availability of PCRA remedies in the past – it required Doctor to exhaust PCRA remedies in the future, *under the post-1996 amended PCRA*, *i.e.*, the same one involved here. *See Doctor*, 96 F.3d at 681-82; *see also Lambert*, 134 F.3d at 521 n.26 (expressly rejecting Respondent's view of *Doctor*).

Respondent believes *Banks* inapposite because it was a capital case. *See* Resp. Br. at 49. But *Banks* held that exhaustion was required "in death penalty cases (and *other cases as well*)" until "future experience" might "show that the Pennsylvania Supreme Court consistently and regularly applies" the PCRA time-bar. *Banks*, 126 F.3d at 214 n.3; *see also Lambert*, 134 F.3d at 521 & n.26 (expressly rejecting attempt to distinguish treatment of capital and non-capital Pennsylvania cases under *Banks*).

Respondent says *Lambert* "specifically contrasted Pennsylvania's non-jurisdictional procedural bars . . . with the new jurisdictional filing deadline." Resp. Br. at 49. But *Lambert* never even suggested it viewed the PCRA time-bar as "jurisdictional" – it consistently and repeatedly (ten times) called it a "statute of limitations." *Lambert*, 134 F.3d at 518, 522, 523, 524. Nor did *Lambert* "specifically contrast[ ]" the time-bar with other procedural bars – it referred to both "waiver" and the "statute of limitations" as rules of "procedural default" or "procedural bar." *Id*. at 518. And more, Respondent's current claims about *Lambert* are contrary to the position taken by Pennsylvania in this Court in *Lambert* itself. *See Lambert v. Blackwell*, No. 97-8812, Brief in Opposition to Petition for Writ of Certiorari at 7-8 (U.S. May 22, 1998), available at www.attorneygeneral.gov/press/lambert/ussupreme/wri2.htm (visited Jan. 30, 2005) ("While recent amendments to the PCRA seemed to provide that Lambert would be deemed to have *waived* review of those claims by *failing to have filed in a timely manner* for review of them, the Court of Appeals explained that there was a substantial body

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D. Respondent says equitable tolling applies only to "a litigant who was actively prevented from meeting a statutory deadline" and that there was not "any *impediment* to doing so" here. Resp. Br. at 38-39 (emphasis in original), citing *International Union of Elec., Radio & Mach. Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976). Even if we work only from Respondent's perspective, there was an "impediment" here – as the District Court found, Third Circuit exhaustion law required Petitioner to litigate the PCRA proceedings before coming to federal court.[17] And Respondent's own authority says equitable tolling of a federal statute of limitations is appropriate while a litigant pursues state court remedies that are eventually dismissed on procedural grounds. *See Robbins & Meyers*, 429 U.S. at 237-38, citing *Burnett v. N.Y. Central R. Co.*, 380 U.S. 424 (1965); *see also* Pet. Br. at 48 n.37, discussing *Burnett* and similar cases.[18]

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of Pennsylvania decisional law pre-dating the PCRA amendments which recognized that a prisoner could *obtain review of waived claims where it was shown that a 'miscarriage of justice' had occurred. . . .* Since this avenue of relief had not been specifically eliminated in the new PCRA amendments, nor in any decisional law following their enactment, the Third Circuit said it could not confidently say that seeking relief in state court would be futile . . . [A]s the Court of Appeals has correctly understood . . . , the *availability of review of those claims in the Commonwealth's courts is an unsettled point of law in the wake of the PCRA amendments*. It is simply not clear that these claims are procedurally barred under Pennsylvania law.") (citing *Lambert*, 134 F.3d at 519-24).

[17] Had Petitioner filed a federal habeas petition, it would have been dismissed for lack of exhaustion, which, for statutory tolling purposes, is equivalent to never filing at all. *See Duncan v. Walker*, 533 U.S. 167 (2001).

[18] In *Burnett*, the state court dismissed for lack of venue. Numerous decisions recognize that this same tolling rule applies when the proceedings are dismissed for lack of jurisdiction, at least when the

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E. Respondent says Petitioner "wasted his time in state court" because the PCRA proceedings supposedly presented "only issues that were already exhausted, or that were non-federal." Resp. Br. at 8, 42. Actually, Petitioner's PCRA proceedings presented two new federal constitutional claims and several new factual allegations which necessitated exhaustion, *as the District Court found*. *See* Pet. Br. at 2, 8-9, 19, 21, 35, 47.

Respondent admits that Petitioner's PCRA petition raised a new federal constitutional challenge to the legality of his sentence; Respondent asserts, however, that Petitioner "abandoned the federal aspect of the claim" on appeal. Resp. Br. at 42-43. Actually, Petitioner continued to present the federal constitutional claim to the Superior Court and the Pennsylvania Supreme Court;[19] he described the claim in terms that invoked the Eighth and Fourteenth Amendments;[20] and he cited caselaw that applied

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litigant had a good faith basis for believing the state court would have jurisdiction. *See* Pet. Br. at 48 n.37 (citing *Doherty v. Teamsters Pension Trust Fund*, 16 F.3d 1386, 1389, 1393-94 (3d Cir. 1994), *Husch v. Szabo Food Service Co.*, 851 F.2d 999, 1001, 1003-04 (7th Cir. 1988) and *Walck v. Discavage*, 741 F.Supp. 88, 89, 91-92 (E.D. Pa. 1990), in each of which the "wrong forum" litigation was dismissed for lack of jurisdiction); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174-75 (9th Cir. 1986); *Fox v. Eaton Corp.*, 615 F.2d 716, 719-20 (6th Cir. 1980); *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1053-54 (5th Cir. 1980); *Berry v. Pacific Sportfishing, Inc.*, 372 F.2d 213, 214-15 (9th Cir. 1967).

[19] *E.g.*, JA257 ("this is a challenge to the legality and constitutionality of the mandatory sentence imposed"); JA343 (same); JA257 (raising "issue of the constitutionality of a life sentence"); JA343 (same); JA321 ("the sentence was unconstitutional").

[20] *E.g.*, JA265 (sentence is "excessive, disproportionate, and arbitrary punishment" which does not "differentiate among offenders with a view to just individualization in their treatment"); JA352 (same).

Eighth and Fourteenth Amendment analysis to similar claims.[21]

Respondent admits that the PCRA petition's "challenge to the validity of [Petitioner's] plea . . . surely was a federal issue"; Respondent asserts, however, that this claim "had already been exhausted" in the prior PCHA proceedings. Resp. Br. at 43. Actually, the prior PCHA proceedings presented an *ineffective assistance of counsel* challenge to the guilty plea, *see* JA108-114, JA122-131; Pet. Br. at 4-5, while the PCRA proceedings presented a *due process* attack on the plea colloquy, *see* JA190-193, JA213-220; Pet. Br. at 8-9, which had not been presented previously.

Respondent admits that the PCRA proceedings presented new evidence; Respondent asserts, however, that the state courts could not consider the new evidence because it supported a claim that was raised in the prior PCHA proceedings. *See* Resp. Br. at 43. Actually, Pennsylvania law allowed consideration of new evidence in support of a previously raised claim, at least where, as here, the new evidence was accompanied by allegations that prior counsel were ineffective for failing to provide the evidence to the courts.[22]

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[21] *E.g.*, JA257, JA343, citing *Commonwealth v. Middleton*, 467 A.2d 841, 845-46 (Pa.Super. 1983) (addressing prisoner's argument that mandatory life sentence for second-degree murder violates Eighth and Fourteenth Amendments).

[22] *See Commonwealth v. Moore*, 860 A.2d 88, 98 & n.5 (Pa. 2004) (granting relief on basis of new evidence supporting previously litigated claim where petitioner alleged prior counsel was ineffective for failing to present it); *Commonwealth v. Miller*, 746 A.2d 592, 602 n.9 (Pa. 2000) (when PCRA "claim does not rest solely upon the previously litigated evidence, we will reach the merits of appellant's claim"); *id*. at 602 n.10 (same); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 113-14 (Pa. 1998)

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F. Respondent's *amici* assert "no harm, no foul" from Respondent's approach to tolling – they say a petitioner "whose claim has been rejected in state court as untimely would lose in federal court under the doctrine of procedural default." Ala. Br. at 17. But under Respondent's approach Petitioner loses all federal review on *all claims* – including those exhausted in the earlier PCHA proceedings and *not* subject to any procedural default – because the later PCRA claims ultimately were held untimely. Moreover, under the procedural default doctrine, federal relief would be warranted even on the "untimely" claims if Petitioner can show the state court ruling was not based on an adequate and independent state ground, or "cause and prejudice," or "miscarriage of justice." *See* Pet. Br. at 30-31. There are no such safety valves for the time-bar dismissal that Respondent seeks.

G. Respondent says Petitioner should not receive equitable tolling for pursuing the exhaustion that Third Circuit law required because exhaustion "exists to protect the interests of the state, not the petitioner." Resp. Br. at 50. But the exhaustion requirement is not meant to "trap the unwary *pro se* prisoner," *Rose*, 455 U.S. at 520; *Slack v. McDaniel*, 529 U.S. 473, 487 (2000), or "shatter the attempt at litigation of constitutional claims," *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973). Instead, exhaustion is a rule of comity "designed to protect the state courts' role in the enforcement of federal law" by "giving those courts the first opportunity to review all claims of constitutional error." *Rose*, 455 U.S. at 518-19; *see also Duncan*, 533 U.S. at 178-79. And this is exactly

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(revisiting claim decided on direct appeal where petitioner proffered new evidence to support that claim).

why Third Circuit exhaustion law required Petitioner to do what he did – since it seemed the Pennsylvania courts might be willing to address his claims, comity required that they be given the first opportunity to do so. Under these circumstances, it would be "perverse" to allow the exhaustion requirement to "bar [Petitioner] from ever obtaining federal habeas review." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998).

CONCLUSION

This Court should hold that statutory and equitable tolling are appropriate.

Respectfully submitted,

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