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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Was petitioner entitled to toll the federal habeas deadline under section 2244(d)(2) by filing, in state court, a petition for collateral review that violated the state's statutory, jurisdictional time limit, and did not properly commence a post-conviction action?

2. Was petitioner entitled to equitable tolling where he sat on "new" legal issues for four years before any state or federal filing deadlines were enacted, and then delayed his federal habeas petition for three more years while litigating an untimely, futile, successive petition in state court?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

STATE CONSTITUTIONAL PROVISIONS, STATUTORY MATERIALS, AND RULES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITY

STATEMENT OF THE CASE

Murder and plea: 1986

In the course of a robbery, petitioner beat a man to death with a blackjack. The murder occurred on September 18, 1985. The victim, a slightly-built 56-year-old man, had a job in New Jersey, where he was due at 8:00 A.M. He was carrying a brown paper lunch bag. Because he faced a long commute from Philadelphia by public transportation, he was on his way by 4:30 in the morning.

That is when petitioner found him. Unlike the victim, petitioner was at the end of his day, and he was out of money. But he did have in his pocket a blackjack, which he had stolen from a car earlier in the week.

Petitioner noticed the victim and determined to rob him. He grabbed the man's coat and threw him to the pavement. When the victim tried to rise, petitioner began beating him on the head with the blackjack.

An officer on patrol saw the beating and approached the scene. Petitioner walked off, throwing the blackjack into a breezeway as he passed, but he was apprehended and the weapon was recovered. The victim was found lying on the sidewalk with his legs sprawled in the street, and was transported to a hospital. He lingered for ten days, without regaining consciousness, until he died.

Police first questioned petitioner shortly after the assault. Because he was a juvenile, seven months short of his eighteenth birthday, petitioner was warned and interrogated in the presence of his mother. He gave a statement admitting that he had intended to rob the victim, and that he beat the victim's head with the blackjack. After the victim died, petitioner was re-interviewed, again with his mother. He reiterated his earlier confession. J.A. 66-77.

Petitioner was charged with first-degree murder, with notice of an aggravating circumstance that made him eligible for the death penalty. *See* 42 Pa. Cons. Stat. Ann. § 9711(d)(6) ("killing while in the perpetration of a felony"). J.A. 25.

Under Pennsylvania statute, murder charges are not within the jurisdiction of the juvenile court. Petitioner nevertheless sought a transfer there, on the ground that he was making progress in the prison classes he had been attending since his arrest. The court, however, denied the transfer motion, which would have required his release from custody at age 21, resulting in a maximum sentence of only three years for a potentially capital offense. J.A. 33-49.

At that point petitioner, with his parents and his lawyer, reached a plea agreement. The Commonwealth agreed to reduce grading of the murder from first to second degree, which carried a mandatory life sentence but eliminated the possibility of the death penalty. The Commonwealth also agreed to drop the remaining charges, and indicated that it would not proceed in an earlier robbery, committed before the murder here, for which petitioner was still facing trial. J.A. 48-51, 82.

Petitioner's mother and father participated in the plea colloquy, which took place in February 1986. Petitioner's mother vouched that he fully understood the consequences of the plea. Petitioner stated his understanding that, whatever anyone may have told him, he would be bound by his answers in the colloquy. He admitted all the facts of the crime. He also stated his understanding, three different times, that his sentence would be to life in prison.

Petitioner was given warnings about his right to file a motion to withdraw the guilty plea, and to appeal on the

ground that it was not knowing, voluntary, and intelligent. Petitioner filed no motion or appeal. J.A. 51-65, 77-85.

First post-conviction petition: 1986-92

Six months later, petitioner filed a pro se petition under Pennsylvania's post-conviction review act, 42 Pa. Cons. Stat. Ann. § 9541 et seq. He claimed that his confession and guilty plea were not valid after all, and his lawyer was bad. Counsel was appointed and two amended petitions were filed, alleging that prior counsel was ineffective regarding suppression, juvenile transfer, and degree of guilt. The petitions further claimed ineffectiveness on the ground that petitioner hadn't believed that life in prison meant life, rather than some lesser period. Petitioner received an evidentiary hearing at which he testified about his understanding of life imprisonment. J.A. 86-100, 108-14, 126-28.

The post-conviction court denied relief. Petitioner appealed through counsel to the intermediate state court, where the ruling was upheld. Petitioner filed an untimely application for discretionary review in the Pennsylvania Supreme Court, which denied review. These proceedings were completed in September 1992. J.A. 119-32, 142-83.

Pre-deadline delay: 1992-96

At that point petitioner did nothing, for over four years. Toward the end of this period, in November 1995, the Pennsylvania legislature enacted a first-time-ever post-conviction filing deadline. The new provision established a one-year time limit for all defendants who had not previously litigated a post-conviction petition. Those who already had done so, however, like petitioner, would be

barred except in particular circumstances for claims that were previously unavailable.

The legislature delayed the effective date of the new provision for 60 days, until January 1996. In the interim, no filing deadlines would apply, whether or not the defendant had previously received collateral review.

Second post-conviction petition: 1996-99

Petitioner, however, still did nothing, until November 1996, ten months after the filing deadline and ten and a half years after his guilty plea. At that point he filed a new post-conviction petition. There he claimed again that the plea was invalid because he did not understand that life meant life. This time he presented "new" facts in support of the claim: allegations by his parents and brother that they were with him before the plea, and that petitioner's lawyer said he would probably serve only ten or fifteen years. In addition, petitioner made a separate claim that his life sentence was invalid because, in his view, Pennsylvania statutes entitled him to the setting of a parole date. He also argued that counsel in his previous post-conviction litigation were ineffective. J.A. 184-201.

The court again appointed counsel for petitioner. Counsel filed a no-merit letter with the court. Accordingly, pursuant to post-conviction procedure, the court dismissed the petition without directing any response by the Commonwealth. Petitioner appealed and the Commonwealth filed a brief, pointing out that review was barred by the post-conviction time limit. Accordingly, the court below had been without jurisdiction to entertain a new petition. J.A. 228-98.

Petitioner responded. He acknowledged that a new time limit had been enacted before his filing, and that case

law had applied it. He argued, however, that it did not apply to him because his guilty plea occurred before the enactment of the post-conviction filing deadline. He also claimed, as a "new fact," that in 1986 – before his first PCRA petition – he had learned that life means life. The appellate court rejected petitioner's argument, holding that his petition was indeed untimely and that the court below was without jurisdiction. J.A. 299-317.

Petitioner pursued the matter, filing a reargument application. This time he claimed, for the first time, that he fell within the exception to the post-conviction filing deadline for "governmental interference." The nature of the interference was that, in 1989 – while he was litigating his first post-conviction petition, with the assistance of counsel, and seven years before he filed his second post-conviction petition – there had been a prison riot. His personal copies of legal papers were lost. The Commonwealth responded that petitioner was not permitted to raise a new legal claim in a reargument application, and the application was denied. J.A. 318-26. Petitioner then sought discretionary review in the Pennsylvania Supreme Court, which denied the application. J.A. 327-72.

Pre-habeas delay: July-December 1999

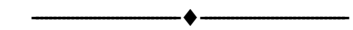
By now it was July 1999 – almost four years after enactment of Pennsylvania's post-conviction time limit, more than two years after expiration of the new grace period for filing federal habeas corpus petitions, and more than a year after petitioner had acknowledged in state court the Pennsylvania filing deadline and the decisional law applying it to cases like his.

Federal habeas petition: December 1999-present

Petitioner waited another five months. Then he filed the federal habeas corpus petition that is the subject of this writ of certiorari – in December 1999. The habeas petition reiterated the claims raised in petitioner's second state post-conviction petition, but dropped the other claims exhausted in petitioner's first state post-conviction petition. J.A. 373-90.

Respondent pointed out that the habeas petition was plainly out of time. The magistrate judge recommended dismissal on that ground. J.A. 391-406. The district court, however, accepting each and every one of the myriad arguments put forth by petitioner, granted him both statutory and equitable tolling. The court appointed counsel for petitioner from the Capital Habeas Corpus Unit of the Defender Association of Philadelphia. J.A. 447-67. The court subsequently denied the Commonwealth's motion for reconsideration of the tolling questions, but granted its motion for an immediate appeal. J.A. 503-33.

The United States Court of Appeals – following its own precedent, and consistent with the majority of the circuits – reversed. The court of appeals held that petitioner was entitled to neither statutory nor equitable tolling. J.A. 534-38. Petitioner sought a writ of certiorari in this Court, which granted the writ on September 28, 2004.



SUMMARY OF ARGUMENT

Pennsylvania, like Congress, has chosen to limit the time for filing post-conviction petitions. Petitioner, knowing of the limit, chose to file a state post-conviction petition after

the deadline, and chose not to file a federal habeas petition in the interim, betting that the delay might not be counted against him in either court. The habeas corpus tolling provision does not permit that kind of delay, nor do equitable tolling principles.

The Pennsylvania legislature passed a post-conviction filing deadline that closely tracks AEDPA's – one year, with three exceptions for newly-arising claims. The Pennsylvania statute, however, explicitly designates its time limit as a jurisdictional requirement, in explicit distinction to non-jurisdictional procedural bars in the statute, which are subject to court-made exceptions. The Pennsylvania courts have uniformly applied the filing deadline as a mandatory prerequisite to the exercise of judicial authority in post-conviction actions. A post-conviction petition that does not meet the filing deadline cannot plausibly be characterized as "properly filed."

Contrary to petitioner's argument, "proper filing" requirements under § 2244(d)(2) are not limited to purely mechanical rules that are enforced by court clerks standing at the counter. The tolling provision refers not simply to physical "delivery" of papers to a court employee, but to the proper commencement of the post-conviction process. The goal of the "properly filed" proviso is to protect important state interests concerning invocation of post-conviction actions – not to deprive petitioners of federal review because they transgressed minor rules of form in the clerk's office.

Nor are proper filing requirements limited to purely "claim-blind" rules. When subsection (d)(2) speaks of proper filing in regard to "applications," it does not exclude filing rules that consider the nature of individual claims within the application – for example, whether a claim is

based on a new rule of constitutional law. Section 2244 uses exactly the same word – "application" – in contexts that call for exactly such claim-by-claim review. If, as petitioner contends, all "proper filing" rules had to be claim-free, then states could never have filing deadlines with "exceptions" like those in the federal statute of limitations or successive petition provision – and as a consequence petitioners could never exhaust in state court the kinds of claims that would qualify for review in federal court.

Equitable tolling does not permit petitioner to escape the consequences of his decision to pursue untimely, additional litigation in state court at the expense of proceeding on time in federal court. Petitioner cannot blame the delay on his "uncertainty" about the state filing deadline, because most of his delay occurred before the filing deadline even existed. Nor can he blame the need to exhaust, because when he finally did initiate a second post-conviction petition, he tried to preserve only issues that were already exhausted, or that were non-federal.

Uncertainty would be no excuse in any case. Petitioner always knew there was a risk that his state petition would be deemed untimely, and therefore would not toll his federal habeas deadline. That risk only grew greater as the law developed. Petitioner was not entitled to take the risk merely because he wanted to exhaust more claims: by enacting a statute of limitations, Congress necessarily limited the opportunities to exhaust more claims. Equitable tolling cannot properly defeat the statute's mandate.

ARGUMENT

I. A state post-conviction petition that has been ruled untimely by the state's own courts, under a mandatory, non-waivable, jurisdictional time limit that is prerequisite to substantive review, is not properly filed under section 2244(d)(2) and cannot toll the time for filing a federal habeas petition.

A. Under Pennsylvania law, petitioner's untimely petition did not lawfully invoke the court's authority to act, and thus could not properly commence a post-conviction action.

Petitioner argues that this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000), was a bequest of which he is a beneficiary, along with all others filing untimely, jurisdictionally barred Pennsylvania post-conviction petitions. Curiously, however, he barely mentions the language from *Artuz* that bears most directly on the issue in this case:

> [A]n application is "properly filed" when its delivery and acceptance are in compliance with the applicable laws and rules governing filings. These usually prescribe, for example, . . . the time limits upon . . . delivery. . . . See, *e.g.*, . . . *Lovasz v. Vaughn*, 134 F.3d 146, 148 (CA3 1998). . . . If, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction, . . . it will be *pending*, but not *properly filed*.

531 U.S. at 8-9.[1] Petitioner's efforts to downplay these words, in a footnote at the end of his *Artuz* arguments,

[1] The relevant language from *Lovasz v. Vaughn* is as follows:

> We believe that a "properly filed application" is one submitted according to the state's procedural requirements, such

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Brief for Petitioner at 29 n.20, have far broader implications than he lets on, and will be addressed below. First, however, it is necessary to clarify the nature of the Pennsylvania filing requirement at stake.

Petitioner works to portray the Pennsylvania filing requirement as equivalent to the two New York procedural rules at issue in *Artuz*; but it is clear under Pennsylvania law that its jurisdictional time limit is significantly different. In Pennsylvania, all post-conviction litigation in criminal cases is governed by the Post-Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. Ann. §§ 9541-46. For many years, the PCRA contained no filing deadlines. It did, on the other hand, include procedural bars very much like New York's successive petition rules. There was also an open-ended laches provision akin to former Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts. These sections, which remain in the statute with minor changes, have never been referred to either as filing requirements or as jurisdictional. Instead they appear in the portion of the PCRA explicitly entitled "Eligibility for Relief."[2]

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as the rules governing the time and place of filing. A Pennsylvania PCRA petitioner, for example, must file a motion with the clerk of the court in which he was convicted and sentenced, Pa. R. Crim. P. 1501, generally within one year of the date the judgment becomes final, 42 Pa. Cons. Stat. Ann. § 9545(b)(1).

134 F.3d at 148.

[2] 42 Pa. Cons. Stat. Ann. § 9543(a)(3) (prohibiting relitigation of claims raised in a prior appeal or collateral proceeding, or litigation of new claims that could have been raised in a prior appeal or collateral proceeding); 42 Pa. Cons. Stat. Ann. § 9543(b) (petition otherwise eligible for relief may be dismissed if delay in filing prejudices Commonwealth's ability to respond or to retry case); *see* 42 Pa. Cons. Stat. Ann. §§ 9544(a), (b) (defining terms).

(Continued on following page)

By 1995, however, there were growing concerns that these existing limitations were not adequate to address the problem of post-conviction delay in capital and non-capital cases. The Pennsylvania Legislature undertook a major revision of the law, guided in significant respects by the federal habeas reform package that was then moving through Congress and soon became the AEDPA. As with AEDPA, the legislature created a whole new subchapter exclusively devoted to capital cases, 42 Pa. Cons. Stat. Ann. §§ 9570-79, and also made many changes to the existing PCRA for non-capital cases and for capital cases not falling under the new subchapter.

The most significant of the PCRA amendments was the creation of a filing deadline for post-conviction petitions. This was a radical departure from prior Pennsylvania practice, which had never imposed a specific time period for seeking post-conviction review. The filing provision closely paralleled the then-pending federal proposal that became § 2244(d). As under § 2244(d), petitioners generally have one year to file from the conclusion of direct review. But also as under § 2244(d), there are three instances in which a later deadline applies: if governmental interference prevented prior filing; if a new constitutional right is recognized and made retroactive; or if new facts arise that could not have been discovered through due diligence. 42 Pa. Cons. Stat. Ann. § 9545(b).

In addition to these procedural bars, the "Eligibility for Relief" provision also lists substantive bases for relief, such as illegal sentence and ineffective assistance of counsel. 42 Pa. Cons. Stat. Ann. § 9543(a)(2).

These three late filing provisions, referred to in the Pennsylvania statute as "exceptions," in fact operate as triggering events, in a manner similar to the cognate provisions in the federal statute. That is, a new filing period (albeit shorter than the original year) begins to run any time one of the specified contingencies occurs. *See* 42 Pa. Cons. Stat. Ann. § 9545(b)(2). By corresponding its filing deadline in this respect to § 2244(d), the state achieved two goals. It opened an avenue for state court review of exactly those late-arising claims for which federal habeas review would lie; and it did so in a manner that nonetheless prevented delay. Thus the state time limit allows no excuse for not exhausting, but no excuse for not doing it promptly either.

In one important particular, however, the Pennsylvania Legislature chose to depart from the federal filing deadline: the matter of jurisdiction. The legislature was aware that the successive petition and delay provisions already present in the PCRA had been subjected, through the exercise of judicial authority, to various qualifications and circumventions – notably for "miscarriages of justice." The legislature, however, had considered and rejected that kind of provision in its new time limit.[3] To emphasize, therefore, that the new filing provision was of a different nature than the procedural bars in the existing statute, the legislature designated the filing deadline as a jurisdictional requirement.

Accordingly, the amended statute placed the new filing requirements not in the "Eligibility for Relief"

[3] *See* Pennsylvania Legislative Journal – House, First Special Session, at 510-12, 517-19 (October 30, 1995) (debate on proposed amendment to add "manifest injustice" exception).

section of the PCRA, 42 Pa. Cons. Stat. Ann. § 9543, where the laches and successive petitions clauses appeared, but in a separate section entitled "Jurisdiction and Proceedings," where the time limit forms a new subsection, 42 Pa. Cons. Stat. Ann. § 9545(b). Jurisdictional amendments were also made to the subsections that precede and follow the filing provision. These new enactments remove the power of the PCRA court to entertain pre-petition requests for preliminary relief, such as discovery, or to grant unauthorized stays of execution. 42 Pa. Cons. Stat. Ann. § 9545(a), 9545(c).

These invocations of jurisdictional status, while significant in themselves, take on particular meaning as a matter of Pennsylvania law. Under the Pennsylvania Constitution, the powers of the legislature and the courts are strictly separated. Most matters concerning the operation of the judicial system, such as court rules, are solely within the control of judges. One judicial matter, however, is reserved uniquely to the legislature: the setting of jurisdiction of the courts.[4] Thus the limitations period was not a rule of practice for the orderly administration of court business, but an application of the legislature's exclusive constitutional authority to determine the types of post-conviction cases within the courts' authority to adjudicate.

And from the beginning, the Pennsylvania courts have recognized that they were without legal authority to

[4] Pa. Const. art. V, § 2(c) (state supreme court "shall have such jurisdiction as shall be provided by law"); art. V, § 10(c) (state supreme court "shall have the power to prescribe general rules governing practice, procedure and conduct of all courts," but may not "affect the right of the General Assembly to determine the jurisdiction of any court").

disregard or go beyond the terms of the new PCRA filing requirement. The very first appellate opinion to address the statute stated in unmistakable terms:

> [T]he PCRA court lacked jurisdiction to hear appellant's PCRA petition. . . . We note that before the 1995 amendments to the PCRA, this Court and the Supreme Court had held that delay in filing a PCRA petition, standing alone, is not a sufficient reason to deny the petition. . . . It is clear from the enactment of the 1995 amendments that the General Assembly intended to change existing law by providing that delay **by itself** can result in the dismissal of a petitioner's PCRA petition. As a result, though this result may appear harsh . . . , that is the result compelled by the statute. . . . The trial court properly denied appellant's PCRA petition as it lacked jurisdiction to hear the petition because it was untimely under 42 Pa. C.S. § 9545.

Commonwealth v. Alcorn, 703 A.2d 1054, 1056-57 (Pa. Super. 1997) (emphasis in original).

Subsequent Pennsylvania decisions have recognized that, because the filing requirement is jurisdictional, 1) it cannot be waived by the state, 2) it must be considered *sua sponte* by the court if not raised by the parties, 3) it must be resolved as a threshold question before the merits can be addressed, 4) it must be applied regardless of the merits or magnitude of the substantive claims raised, and 5) it is not subject to non-statutory forbearance such as lack of notice, equitable tolling, miscarriage of justice, illegality of sentence, or ineffective assistance of counsel.[5]

[5] *See, e.g., Commonwealth v. Judge*, 797 A.2d 250, 256 n.13 (Pa. 2002) (although Commonwealth did not previously claim that PCRA petition was untimely, "we will address it because the claim relates to

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As a matter of Pennsylvania law, then, there can be no doubt about the meaning of the post-conviction filing deadline. The time limit is specifically distinguished from procedural bars and other forms of eligibility for relief. Instead, the PCRA filing deadlines are "[j]urisdictional time limits [that] go to a court's right or competency to adjudicate a controversy." *Commonwealth v. Fahy*, 737 A.2d 214, 222 (Pa. 1999). Under Pennsylvania law, therefore, an untimely post-conviction petition does not properly invoke post-conviction jurisdiction, cannot properly commence a post-conviction action: is not properly filed.

B. Federal law does not excuse petitioner's delay and ignore Pennsylvania's post-conviction time limit merely because the state filing rule is not automatic and absolute, but instead allows for judicial review and for consideration of newly-arising claims.

Petitioner argues that we should not be fooled by Pennsylvania's post-conviction time limit: just because it

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our subject matter jurisdiction"); *Commonwealth v. Yarris*, 731 A.2d 581, 587 (Pa. 1999) ("Because the timeliness implicates our jurisdiction, we may consider the matter sua sponte"); *Commonwealth v. Pursell*, 749 A.2d 911, 913-14 (Pa. 2000) (trial court denied post-conviction claims on basis of previous litigation and waiver bars, without addressing petitioner's claims that petition was timely; "[b]ecause this presents a threshold question concerning whether there is jurisdiction to grant relief on Appellant's petition, however, we will address this matter"); *Commonwealth v. Howard*, 788 A.2d 351, 356 (Pa. 2002) ("The timeliness requirements of the PCRA do not vary based 'on the nature of the constitutional violations alleged therein. . . . To the contrary, . . . the PCRA's timeliness requirements . . . are intended to apply to all PCRA petitions, regardless of the nature of the individual claims raised therein' "); *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999) (refusing to trump statutory time limits with judicial doctrines such as "relaxed waiver," equitable tolling, miscarriage of justice, or "King's Bench" powers).

calls itself a filing requirement, and is consistently enforced as a prerequisite to the exercise of post-conviction jurisdiction, doesn't mean it has anything to do with "properly filed" applications for post-conviction relief under § 2244(d)(2) of the federal habeas statute. Congress must have meant some other kind of thing entirely.

Petitioner offers two conditions for the kind of post-conviction time limit that Congress really meant when it referred to "properly filed" petitions. First, the filing deadline has to be applied automatically, by court clerks, at the point where the petition is physically presented. Second, the filing deadline has to be applied absolutely, without regard to individual claims that might have been unavailable at the time of the original deadline. Pennsylvania meets neither condition, contends petitioner, so his untimely, jurisdiction-barred post-conviction petition was perfectly "proper," and he gets tolling. The problem with this approach is that the language Congress chose in the habeas statute cannot support either of petitioner's glosses on (d)(2).

1. "Clerk-specific" rules.

Petitioner's first challenge to the Pennsylvania time limit – his "clerk-specific" argument – in effect imagines (d)(2) as a game of "hot potato." As long as he is able to hand off a post-conviction petition to the clerk without the clerk tossing it back, he wins, regardless of the nature of the potato/petition in question. If the clerk has it, it is "filed," and if the clerk doesn't give it back, it must be "properly filed."

Under this mechanical view, Pennsylvania's jurisdictional time limit obviously fails to qualify as a "proper filing" requirement. In Pennsylvania, as petitioner points

out, clerks physically accept post-conviction petitions for docketing, without regard to timeliness questions. Qualified judges, rather than lay court employees, then review the many legal questions that arise in applying a filing deadline. Post-conviction petitioners are entitled to appointment of counsel to litigate timeliness issues, and can appeal timeliness rulings to a higher court. All this due process, argues petitioner, in effect makes Pennsylvania's time limit too fair to be a proper filing requirement.

To be sure, petitioner reaches these conclusions by reference to language borrowed from this Court's opinion in *Artuz*. He notes, for example, that *Artuz* relies on the definition of "file" found in Black's Law Dictionary: "to deliver a legal document to the court clerk or record custodian for placement into the official record." 531 U.S. at 8. But in *Artuz* this Court went out of its way to *reserve* the question presented in this case. *Id*. at 8 n.2. The Court's reservation of the issue appropriately recognized that the language used there cannot be presumed sufficient to resolve the status of jurisdictional time limits under subsection (d)(2).

Thus it is necessary to go beyond petitioner's *Artuz* quotation. And Black's itself is an appropriate point from which to carry forward, because in fact it lists another definition of "file," immediately after the first. That *second* definition is this: "to commence a lawsuit." Black's Law Dictionary, 642 (7th ed. 1999). That is exactly what the filing of a post-conviction petition represents: the commencement of a new action. Although the judgment at issue is the same as that in the underlying criminal case, the original proceeding ends with completion of direct review. The defendant must then initiate a new action to

invoke the court's jurisdiction over his sentence. Some ways of doing so are permitted by law; some are not.

Petitioner suggests no possible justification for excising from the statute this second meaning of "filing" as commencement of a post-conviction action. Certainly the legal context in which Congress wrote does not support such an artificially narrow reading. The Federal Rules of Civil Procedure specifically provide that "[a] civil action is commenced by filing a complaint." Fed. R. Civ. P. 3. Habeas petitions are civil actions and, as this Court has recently held, Rule 3 governs habeas actions. *Woodford v. Garceau*, 538 U.S. 202 (2003). Congress well understood, therefore, that its use of the word "filing" conveyed not merely mechanical delivery, but commencement of a post-conviction action.[6]

In this fuller sense of the phrase, "proper filing" is still consistent with the result in *Artuz*, because the procedural bars at issue there did not affect the commencement of the post-conviction action. Those bars came into play only after the post-conviction court's jurisdiction was perfected. They may at that point have prevented relief on particular claims, but they did not deprive the court of power to exercise judicial authority over the case.

Yet "filing" in the sense of commencement is broader than the diminished definition pushed by petitioner. He proposes a universe in which clerks pore over papers with magnifying glasses. If they find a violation of any filing

[6] *See also* Pa. R. Crim. P. 1501 (West 1997), cited in petitioner's brief at 25, reproduced in petitioner's appendix at 10, and titled "Initiation of Post-Conviction Collateral Proceedings."

rules, they must refuse to accept the document. Only if the clerks violate their own rules, by taking possession of a document that their procedures required them to hand back, would petitioner label the filing as improper.

In the real world, however, clerks of court often lack power to refuse acceptance of documents, and are therefore incapable of accepting them improperly. Petitioner notes this to be the practice in Pennsylvania. But it is also true in all federal district courts, where habeas actions are commenced,[7] in the federal appellate courts,[8] and in many states as well.[9] Clerks may point out errors to judges, and those judges may be empowered to dismiss after review; but in the meantime, according to petitioner, the document was properly filed – because, under the marching orders

[7] Fed. R. Civ. P. 5(e) provides: "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form as required by these rules or any local rules or practices." The Advisory Committee Notes, 1991 amendments, explain:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

[8] Fed. R. App. P. 25(a)(4) (parallel to Fed. R. Civ. P. 5(e)).

[9] *See, e.g.,* Ala. R. Civ. P. 5(e); Ark. R. Civ. P. 5(c)(1); Haw. R. Penal P. 42; R.I. R. Civ. P. 5(e); Vt. R. Civ. P. 5(e).

given to the clerks, they did not act "erroneously" in accepting it.[10]

But if the statute is exclusively about court clerks, as petitioner posits, then the distinction between "filed" and "properly filed" necessarily disappears. Procedures requiring "automatic" filing exist not because clerks are incompetent, but because there really is no such thing as a set of simple "filing rules" that could appropriately be administered without judicial review. Petitioner seems to envision some Platonic ideal of a filing deadline, pure and flat: one week/month/year from final judgment. If Pennsylvania had chosen *that* kind of time limit, hints petitioner, court clerks could have adjudicated it, at the point of delivery, and late petitions therefore would not toll under § 2244(d)(2). If, on the other hand, Pennsylvania instead wants to have a messier deadline, one that takes time and judges to sort through, that's fine too; it's just not a filing requirement under 2244, because filing requirements, according to petitioner, are only about "clerks" and "delivery."

In the real world, of course, the archetypal, easy filing deadline does not exist. When is judgment "final?" Is the

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[10] Brief for Petitioner at 29 n.20 (emphasis in original):

> the clerk of court does not act 'erroneously' when s/he accepts a PCRA petition that is ultimately deemed untimely (assuming it is the court in the county where the petitioner was convicted) – under the applicable rules, the clerk *must* accept the petition and transmit it and the record to the judge for review.

Under this reasoning, even cases filed in the wrong court will be "properly" filed, because they were not physically rejected by the clerk. *See, e.g.,* 42 Pa. Cons. Stat. Ann. § 5103(a) (matter commenced in court or district lacking jurisdiction shall be transferred to proper tribunal rather than dismissed).

petition due on the 365th day, or the 366th? Is the petition filed when received by the court, or when delivered to prison officials? What kind of post-deadline amendments may be allowed? These are significant legal issues that are not readily resolved in the federal courts,[11] no less the states. Often they require not just the formulation of new rules, but careful case-by-case application, and even evidentiary hearings. These determinations simply cannot be made upon receipt of a petition by the clerk; there is no choice but to accept the document and permit judicial review. Under petitioner's view, therefore, all such petitions are "properly filed"; no state time limits can qualify as true filing requirements under § 2244(d)(2); and untimely state post-conviction petitions always toll the federal habeas corpus deadline.

The logical endpoint of petitioner's reasoning is revealed by a case from one of the minority circuits employing his approach to the "proper filing" issue. In *Estes v. Chapman*, 382 F.3d 1237 (11th Cir. 2004), the state argued that an untimely post-conviction petition did not toll under § 2244(d)(2), because the state court lacked jurisdiction. The court of appeals rejected that position, in part because "the State conceded at oral argument that Georgia courts do have jurisdiction to determine whether they have jurisdiction," and the petition therefore was properly filed. *Id.* at 1241. All courts, however, have jurisdiction to determine whether they have jurisdiction. The only way to

[11] *Compare, e.g., Burns v. Morton,* 134 F.3d 109 (3rd Cir. 1998) ("calendar" rule), *with United States v. Marcello,* 212 F.3d 1005 (7th Cir. 2000) ("anniversary" rule); *see Mayle v. Felix*, 73 U.S.L.W. 3396 (Jan. 7, 2005) (No. 04-563) (*granting cert.*) (concerning circuit split on standards for amending federal habeas petitions after expiration of filing deadline).

resolve a threshold jurisdictional issue is to accept the filing and conduct judicial review. If such a filing is thereby deemed "proper" – even where the court determines that it never had jurisdiction to entertain it – then lack of jurisdiction is completely irrelevant to the tolling question.

This view not only twists the statute inside out; it also conflicts directly with *Artuz*, the case that petitioner claims as winning precedent. Petitioner says that Pennsylvania's time limit does not "function" as jurisdictional, despite its label. Brief for Petitioner at 29 n.20. What he really means is that jurisdiction itself cannot function as a filing requirement, despite the fact that this Court said exactly the opposite in *Artuz*. Petitioner's "clerk-specific" argument for tolling must fail.

2. "Claim-blind" rules.

But petitioner also has his other challenge to the Pennsylvania time limit – his "claim-blind" argument. This time the game brought to mind by petitioner's position is "no peeking." According to petitioner, real filing requirements, for purposes of § 2244(d)(2), cannot depend in any manner on the identity of the claims contained within a post-conviction petition. A state's filing deadline does not count under the tolling provision unless it is absolute, therefore; no provision can be made for particular claims that might justifiably arise at a later time. Since Pennsylvania's filing deadline does exactly that, it is not really a filing requirement at all under § 2244(d)(2). So every post-conviction petition filed in the state, untimely or not, tolls the federal habeas statute of limitations.

As before, petitioner relies on language from *Artuz* for his claim-blind argument; as before, petitioner fails to

reconcile it with the Court's reservation of the question presented here. The true touchstone remains the statute. Petitioner's position rides on a single word from that source: "application." Because subsection (d)(2) speaks of properly filed "applications" rather than properly filed "claims," it must mean to exclude filing provisions that are in any way specific to particular claims within an application.

So says petitioner; but the habeas statute completely contradicts the contention that "applications" must be treated as monoliths, without regard to their contents. The actual usage of the term is apparent in § 2244 itself. The federal statute of limitations and its tolling provision appear in the same section of the habeas statute as the provision governing second or successive petitions. Subsection (b)(3)(A) provides that the court of appeals must first authorize the filing of such an "application." The authorization is for *applications*, not for *claims*.

How, then, is the court of appeals to decide whether to authorize a second "application?" By determining whether the petitioner has made "a prima facie showing that the application satisfies the requirements of this subsection." § 2244(b)(3)(C). These requirements are spelled out in § 2244(b)(1) and (b)(2). A glance at these provisions, however, shows that, far from implying an all-or-nothing analysis for approving second "applications" – as petitioner would have us expect – the habeas statute in fact requires exactly the opposite. Both (b)(1) and (b)(2) call for identification of individual "claims" – for example, whether "a claim presented in a second or successive . . . application" was previously raised, § 2244(b)(1), or whether a

"claim presented in a second or successive . . . application" relies on a new constitutional rule, § 2244(b)(2)(A).

Accordingly, although the habeas statute plainly requires the court of appeals to make a determination as to "applications," there is no way to apply (b)(3) to applications as a whole. There is no other way than by reference to individual claims. That is how Congress used the word "application" in § 2244 – as a synecdoche for a collection of claims on which the application will rise or fall.

Another example lies even closer at hand, in the first part of the statute of limitations provision itself: § 2244(d)(1). The statute provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus." The filing deadline is for *applications*, not for *claims*. How, then, does the deadline apply? The statute lists four ways. The first method, which calculates the one-year period from the date of final judgment, does address the habeas petition as a whole. But every other means of calculating the period permits, or even requires, resort to the nature of an individual claim. § 2244(d)(1)(B) (government impediment to filing); § 2244(d)(1)(C) (new constitutional right); § 2244(d)(1)(D) (new "factual predicate of the claim"). When Congress said "application," therefore, it obviously did not mean to treat the term as a black box. Instead the statute commands the court to open the box and look inside.

But there is more direct proof that Congress did not use the word "application" to require an all-or-nothing analysis – this time within the tolling provision itself. Petitioner focuses on the phrase "properly filed application." He stops short of the critical language. The full passage in § 2244(d)(2) goes further, providing tolling for a properly filed application for review "with respect to the

pertinent judgment ***or claim***." Plainly, Congress went out of its way to mention claims, and to contrast them with judgments. The statute thereby explicitly acknowledges that an application may toll either in relation to the judgment or in relation to individual claims. Petitioner is at a loss to explain how this language can possibly be read to *forbid* any examination of individual claims in determining the propriety of the application – especially in a statute where Congress has just mandated exactly such a procedure for applying the successive petition bar and the filing deadline.

How, then, does the tolling provision avoid the peculiar prospect of an application that is both "properly filed" as to some claims and not "properly filed" as to others? Because, under the statute, all it takes is one. If the petitioner has properly placed before the state court *any one claim* for post-conviction review, he is entitled to tolling of the federal deadline while he litigates in the state. The function of § 2244(d)(2), therefore, is not to decide whether the petitioner will succeed in state court, but merely to determine whether he has gotten in the door. For purposes of § 2244(d)(2), the "application" is proper, even if it contains some claims that are not authorized for review – as long at it contains one that is. Thus to speak of a properly filed petition is to speak of a petition containing at least one claim entitling the court to act.

The Pennsylvania time limit dovetails precisely with this approach. The court is invested with jurisdiction if it finds at least one claim that satisfies the time limit. At that point, the court has authority not only to decide the ultimate question of relief, but to act on ancillary matters. The distinction arises, for example, in the context of stays of execution. If a timely claim has been presented, the

court has power to grant a stay.[12] Other claims in the petition may be outside the filing deadline, and therefore will eventually be dismissed. But they do not affect the court's jurisdiction to act, because the post-conviction action has been properly commenced.

Thus the state time limit looks to the nature of individual claims, but does so, in the first instance, as a gatekeeping function rather than as a condition of relief. That is not to say that such gatekeeping standards must have no effect on the ultimate resolution of individual claims. They may well, but they operate at two levels. The successive petition provision of the federal habeas act illustrates the process. As outlined above, the court of appeals must first consider the statutory standards in order to authorize the petitioner to go forward in district court. Once the petitioner is there, however, the district court must then apply exactly those same standards, and "dismiss" any claim that does not meet them. § 2244(b)(4).

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[12] Thus, the first requirement for a stay of execution under the PCRA

> necessarily includes timely filing pursuant to section 9545(b) and is no more than a threshold jurisdictional requirement. As discussed above, . . . this court explained that the time bar is a jurisdictional requirement. [W]e explained that jurisdictional time limits go to a court's right or competency to adjudicate a controversy. Where a court is without jurisdiction it is without power to act and thus, any order that it issues is null and void. Following this logic, a stay of execution should be granted only where a timely petition is filed, since without a timely filed petition, the trial court is without competency to entertain the matter before it, including the application for a stay of execution.

Commonwealth v. Morris, 771 A.2d 721, 734-35 (Pa. 2001) (citations and internal quotations omitted).

For the few courts following petitioner's absolutist approach, however, this gatekeeping function is not permissible under § 2244(d)(2). In the Ninth Circuit, for example, the law is that a state filing deadline may not consider the merits of individual claims, even to the slightest degree, without forfeiting the protection against post-conviction delay embodied in the federal statute of limitations. This is where the Court's recent decision in *Carey v. Saffold*, 536 U.S. 214 (2002), comes into play. In that case the question was whether the defendant's post-conviction petition was untimely – whether, in the state court's term of art, his delay was "unreasonable." The Ninth Circuit held that the petition must be considered timely, because in dismissing the petition the state court had referred not just to the delay, but to the merits of the petition's claims. Accordingly, said the court of appeals, the defendant was entitled to tolling under § 2244(d)(2).

This Court reversed and remanded. "If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,'" held the Court, "that would be the end of the matter, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.* at 226.

Petitioner insists that *Carey v. Saffold* has absolutely nothing to do with this case. He says *Carey* was about whether the California post-conviction petition was "pending" for purposes of subsection (d)(2), not whether it was "properly filed." But *Carey*'s significance for this case is not about any differences between the definition of "pending" and the definition of "properly filed." Rather, *Carey* matters because it negates the notion that state timeliness rules must be merits-free. If a state structures its filing deadline so as to "entangle" it with examination of the

substance of a claim, the deadline is nonetheless a condition of review rather than a condition of relief.

Once again it is the successive petition provision of § 2244(b) that demonstrates the point. In order to authorize a second filing, the court of appeals must consider, for example, whether the petitioner has raised a claim controlled by a new, retroactive rule of constitutional law. If the panel concludes that the facts do not fall within the rule asserted, or that the petitioner does not fall within the class entitled to retroactive effect, the case cannot proceed. The panel does not address these questions for the purpose of resolving the merits of the claim, but its determination necessarily means that the claim could not prevail on the merits. Of course not every denial of authorization will have implications for the merits. But whatever the nature of the analysis on particular claims in particular cases, the second petition screening procedure is nonetheless a jurisdictional filing requirement.[13]

Pennsylvania's jurisdictional time limit works in the same manner. It is not always blind to the nature of claims raised in petitions. But the inquiry required by the statute, whether or not it touches on the merits, is still a screening mechanism designed to ensure that the action is properly commenced. Nothing in § 2244(d)(2) penalizes the state for structuring its filing requirement to this effect. Post-conviction petitions filed in violation of the time limit are not properly filed, and do not toll the federal habeas corpus deadline.

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[13] *See, e.g., Alley v. Bell*, 2004 U.S. App. LEXIS 25773 (6th Cir., December 14, 2004) (requirement of pre-authorization to file second habeas petition under § 2244(b) is jurisdictional; where petitioner did not first secure authorization, district court lacked jurisdiction to issue stay of execution).

C. Petitioner's proposed construction of the statute frustrates Congress's intent to prevent delay while permitting exhaustion.

Petitioner's statutory construction argument rested on restrictive reading of two words from § 2244(d)(2) – "filed" and "application" – neither of which, as discussed above, are actually narrow enough to support the result he seeks. Accordingly, petitioner attempts to add breadth to his position with "policy" arguments. These arguments, however, do not even begin to address the policy balance Congress sought to achieve in enacting the federal habeas statute of limitations.

There is no secret: the purpose of AEDPA was not to maximize post-conviction litigation in the state and federal courts. Had Congress wanted simply to "encourage" exhaustion, it could have done so by doing nothing. Before the federal statute of limitations, nothing in the habeas statute kept prisoners from spending as much time as they wished filing state post-conviction petitions; whenever they decided to move on to federal court, the door would still be open. So the one-year filing deadline adopted in § 2244(d)(1) is a *limitation* on exhaustion. It necessarily reduced the opportunity for state court exhaustion by running a clock on the availability of federal habeas review.

The tolling provision of § 2244(d)(2), to be sure, is an exception to the (d)(1) limitation. Congress wanted to maintain some opportunity for additional exhaustion in state court before proceeding to federal court – but only to the degree that states themselves were willing to entertain more litigation. Otherwise there would have been no point in enacting (d)(1) in the first place. As a result, the "proper

filing" requirement is a limitation on the exception. Petitioner seeks to have the limitation largely removed, thereby destroying the intended interplay among the statute's provisions.

1. Delay

As discussed above, petitioner, by defining "filed" to mean nothing more than "received by a clerk," would render virtually all state post-conviction petitions "properly filed." What is left, under petitioner's rationale, is the colorblind clerk who erroneously accepts a petition with a green cover when it was supposed to be blue, until a later clerk with better vision notices the violation and, in accordance with office policy, immediately ships the document back to the hapless applicant. When the prisoner seeks tolling for the two months before the petition was returned to him, subsection (d)(2) emphatically says "no." That, according to petitioner, is what Congress was after when it limited the tolling exception with the words "properly filed."

Meanwhile, the more important filing requirements – the ones the states enact as gatekeepers to ensure the proper invocation of limited post-conviction avenues of review – will be considered by judges after docketing by clerks. Those requirements are not filing rules at all, says petitioner, because they don't govern delivery to and acceptance by the clerk. As a result, petitions filed in violation of such rules are nonetheless "properly filed" under § 2244(d)(2) and toll the federal habeas deadline indefinitely. In effect, therefore, the word "filed" turns around, gobbles up the word "properly," and can now go on to consume all of (d)(1) for good measure.

Significantly, in presenting his policy arguments petitioner does not really hide his desire for such an outcome. Indeed, he suggests that the "proper filing" provision is a bad thing, because prisoners seeking state post-conviction review will not be sure in advance whether their petitions are properly filed. While the state courts adjudicate the matter, petitioner protests, the federal deadline may be passing. Brief for Petitioner at 30.

Petitioner specifically attributes these results to the supposed "harshness" in requiring litigants to file their state petitions on time if they wish to claim tolling under subsection (d)(2). But in truth there is no way to define the phrase "properly filed" so as to avoid the uncertainty that petitioner pleads. Even if (d)(2) did not cover any type of time limit, but instead encompassed only the most mechanical state filing requirements, there might still be contested rulings. And as long as litigation was ongoing in state court, a prisoner could claim confoundment about the status of his federal habeas deadline. The only way to solve the "problem" entirely would be to remove the word "properly" from the federal statute – which is exactly what petitioner tries to do.

Petitioner's other policy challenge is of a similar nature. He argues that he has been deprived of a "safety valve," because, unlike the doctrine of procedural default, a statute of limitations violation cannot be overcome by showing cause and prejudice. Brief for Petitioner at 30-31. Once again, however, petitioner is attacking the statute itself rather than the application of the proper filing provision to the facts of his case. Congress obviously chose not to place a cause and prejudice exception in the statute of limitations. Petitioner seems to want the Court to

override that choice by finding some way to interpret (d)(2) such that a statute of limitations violation never results.

Petitioner proposes these positions as if there were no cost to them. But there is a cost: the post-conviction delay that Congress was trying to restrain. The incentive for delay is not confined to the capital context. The defendant with confidence of a winning claim has little motive to wait; his interest is in prompt litigation and prompt release or resentencing, whether that sentence is death or something less. If, on the other hand, he does not believe he has exhausted a claim that will achieve success on federal habeas review, and if there is no penalty for postponing his habeas petition, then the smarter course may be to try again in state court, however long the odds. In the meantime, good things can happen: new witnesses may appear with fresh memories of events; new legal aid may arrive with fresh theories of litigation.

Petitioner's construction of the tolling provision thus permits those with a motive for delay to indulge it without fear of jeopardizing their federal habeas deadline. Worse, petitioner would encourage delay even by those who may not otherwise be disposed. The federal habeas statute of limitations contains no provision for extensions. Under petitioner's approach, however, prisoners who want more time would be able to give themselves their own extensions – simply by filing an untimely state post-conviction petition.

This is not what AEDPA intended. Congress chose to move the post-conviction process along by placing an outside limit on it. Contrary to petitioner's sentiments, the statute cannot fairly be construed as if delay were not an issue.

2. Exhaustion

In limiting the time for post-conviction litigation, however, Congress did not completely extinguish the opportunity for newly-arising claims. The habeas statute recognizes that certain claims may not be available within one year of final judgment, through no fault of the petitioner. Congress therefore made specific allowance for claims blocked by government impediment, claims based on new constitutional rules, and claims based on previously unobtainable factual predicates. § 2244(d)(1)(B)-(D).

Pennsylvania has adopted these same provisions within its own filing deadline. 42 Pa. Cons. Stat. Ann. § 9545(b)(1)(i)-(iii). By doing so, the state ensures the fairness of its own post-conviction process. But the statute also seeks to provide a state forum for exactly those claims that petitioners will be entitled to raise in federal court under the AEDPA statute of limitations.

Yet petitioner's interpretation of the federal tolling provision – for all his talk of the importance of exhaustion – would jeopardize what he says he desires. Petitioner spends the bulk of his brief attacking the Pennsylvania time limit because it has "exceptions" – the three provisions for newly-arising claims. In reality, these "exceptions" admit into the filing deadline no discretion or delegation of authority to judges. Instead, they in effect create supplemental time periods for seeking post-conviction review. These new periods pop up at any point in the future when triggering events occur after expiration of the initial one-year time limit following direct review. But no matter, says petitioner: the "exceptions" are bad because they focus on individual claims, rather than the "application" as an indivisible unit.

Under petitioner's view, then, the state has two options. Keep the "exceptions" – in which case the filing requirement isn't really a filing rule for purposes of § 2244(d)(2), and all untimely state post-convictions will automatically toll the federal habeas deadline. Or dump the exceptions – in which event petitioners will have no recourse in state court for legitimate new claims, and exhaustion will be impossible. Clearly, this is not what Congress intended. The whole point of subsection (d)(2) is to bring post-conviction delay under control while still providing a window of opportunity to exhaust previously unavailable claims.

Petitioner hints at a way out for the state: a "pre-filing" procedure, akin to the federal successive petition rule or certificates of appealability. With pre-filing, presumably, the state could have its exceptions but still enforce the time limit as a 2244(d)(2) filing rule, because, after all, petitions would not be "filed" until after they were reviewed to see if they met the timeliness requirements. As a result, there would be no tolling unless and until the pre-petition was approved to become a petition.

Why a "pre-filing" label should make a difference, however, is less than clear. Section 2244(d)(2) provides tolling for applications "for state post-conviction or other collateral review." If all states adopt post-conviction pre-filing procedures, surely the argument will be made that requests for authorization are themselves "applications . . . for collateral review" that entitle the petitioner to tolling. If pre-filing is compulsory, if it is a necessary first step in the post-conviction review process, that argument will have some force.

If this tolling argument prevails, however, then pre-filing procedures will have had exactly the opposite of the

intended effect: *all* prisoners seeking permission to proceed will receive tolling while their requests are pending, even if those requests are eventually denied. On the other hand, if requests for authorization do *not* themselves toll, then many prisoners will watch their federal habeas rights expire while they wait for state courts to determine if they have met the necessary "pre-filing" standards. Either result would defeat the purpose of § 2244(d)(2).

The quandary is unnecessary, because in essence Pennsylvania already has a kind of "pre-filing." The time limit itself is a threshold standard for the exercise of post-conviction jurisdiction. That is what makes the statute a filing requirement within the meaning of § 2244(d)(2); and that is why untimely petitions are not "properly filed." Putting trappings on the procedure, by adding a new label or a separate "pre-reviewer," will only make the tolling problem worse, either for the state or for the petitioner. Subsection (d)(2), correctly applied in the context of the Pennsylvania time limit, provides the appropriate balance between delay and exhaustion.

Even if it were appropriate for the Court to tip the statutory balance, however, the less intrusive alternative would be that offered in another case before the Court this Term, *Rhines v. Weber*, No. 03-9046 (argued January 12, 2005). In *Rhines* the petitioner contends that, if a state prisoner files a timely federal habeas petition, but says he has more claims to litigate in state court, the habeas judge should stay the federal proceedings rather than dismiss, so that the petitioner does not lose the benefit of his original federal filing date. *Rhines* is thus the converse of this case, in which the petitioner filed an untimely federal habeas petition after using up all the available time pursuing

improper state litigation, and now asks this Court to rule that the federal period never even started running.

Rhines's position, at least, does somewhat less violence to the text and operation of the federal habeas statute. The exhaustion provision, § 2254(b) and (c), does not explicitly address the stay issue either way. Petitioner's argument, in contrast, requires erasing the word "properly" from 2244(d)(2), and distorting the word "application." With stay and abeyance, moreover, a judge might retain some ability to monitor the applicant's diligence. Petitioner's position, on the other hand, gives him complete control, because he can unilaterally reset the federal deadline simply by filing untimely state petitions. Finally, the stay-and-abeyance petitioner can at least point to one timely-filed petition – the federal habeas application; whereas in cases like this one the petitioner was untimely both in state court *and* in federal court.

In considering stay and abeyance, however, there is one important caveat not directly discussed in the *Rhines* briefs. Rhines addresses stay and abeyance as an all-or-nothing proposition, presumptively available to anyone who says that he needs more time to exhaust additional claims in state court. Yet, as Rhines concedes in his reply brief,

> in the vast majority of cases, there is no remaining state court remedy available to the petitioner by the time he arrives in federal court, either because the state limitations period has expired, or the relevant state rules prevent the filing of a second application for post-conviction relief. In these cases, any claims not previously presented to the state courts provide no occasion for stay-and-abeyance.

Reply Brief for Petitioner, *Rhines*, at 11-14 (footnotes omitted).

Accordingly, no stay should issue under *Rhines* unless the petitioner first makes a definitive showing that a state court remedy remains available to him for unexhausted, cognizable claims. Absent this condition, there is absolutely no basis for halting the proceedings, under Rhines's own rationale. Such a requirement will not mire the federal judge in state law issues, because the judge would have to face those issues anyway in addressing exhaustion and procedural default.

If the federal court grants a stay, it should revisit the issue as the petitioner moves through state court and rulings are made there on the availability of review. If the federal court denies a stay, the claims are procedurally defaulted and the petitioner can raise them in his federal habeas petition through the cause and prejudice standard. Or, if he chooses, he is free to proceed simultaneously in state court, and to ask the federal judge to reconsider the stay question if it appears that he will achieve review at the state level.

Such a procedure may not assure federal habeas review for every previously unexhausted claim in every possible scenario. But there is no fair reading of the statute of limitations that can do that. The purpose of a limitations period is not to guarantee review but to end it at some point. Section 2244(d)(2) will never interfere with a prisoner's ability to litigate a direct appeal and a first PCRA petition filed within a year of the appeal. When, however, the petitioner attempts to go beyond his one full round of direct review *and* one full round of collateral review, difficulties may be inevitable. The language and purpose of the tolling provision should not be garbled in order to avoid the AEDPA limitations period.

II. Petitioner's various excuses do not justify the "equitable tolling" he seeks.

Absent the statutory tolling to which he was not entitled, petitioner falls within the AEDPA one-year "grace period" for filing a federal habeas corpus petition.[14] His habeas petition was due by April 23, 1997. He filed it on December 22, 1999. To explain the untimeliness, petitioner blames the law for not speaking to him more clearly. He says that the habeas deadline should be "equitably tolled" for all the time he was not sure about the proper litigation course to pursue.

The doctrine of equitable tolling, where it applies at all, cushions the impact on a litigant who was actively

[14] Petitioner's amicus argues that federal courts were without authority to establish a grace period, and that without it the AEDPA statute of limitations is unconstitutional as applied to convictions that became final before its enactment. Counsel of record for the amicus is a Philadelphia defense lawyer who raises this issue regularly in certiorari petitions before this Court. *Brinkley v. Gillis*, 73 U.S.L.W. 3397 (Jan. 10, 2005) (*denying cert.*); *Lively v. Kyler*, 125 S. Ct. 280 (Oct. 4, 2004) (*denying cert.*); *Hubley v. Kelchner*, 540 U.S. 914 (Oct. 6, 2003) (*denying cert.*). Review of the certiorari papers in this case, however, does not reveal the question among those on which review has been granted. In any case, the claim is frivolous. *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596 (1873) (courts will presume legislative intent to run limitations period from date of enactment for previously accruing actions).

Petitioner's amicus similarly argues that Pennsylvania's PCRA deadline is unconstitutional because, although the "grace period" there was created by statute (Laws of Pennsylvania, Act 1995-32 (1st Spec. Sess.), Sections 3-4) it is too short. This claim too is not among the questions on review here, nor does petitioner argue it now. The Pennsylvania Supreme Court, however, did soundly reject such a due process claim in another case, pointing out that the successive petitioner there had already had one round of collateral review, and that the new statute permits review for claims that were previously unavailable. *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998).

prevented from meeting a statutory deadline. *E.g., International Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 237 n.10 (1976). Petitioner writes at length about why he didn't think he was compelled to go forward earlier. But he is unable to identify any *impediment* to doing so. He simply did not want to have to make a difficult litigation choice, a choice that – like all choices – may have required him to give up one set of options or another. To apply equitable tolling here would be an abuse of the doctrine.

A. Petitioner was not entitled to equitable tolling where he sat on his "new" claims for four years before Pennsylvania even adopted a post-conviction filing deadline.

Petitioner's entire argument for equitable tolling rests on discussion of various cases addressing the Pennsylvania post-conviction filing deadline following its implementation in 1996. Even assuming that uncertainty about the law could ever qualify as an impediment for equitable tolling purposes – but see below – petitioner's claim would fail before it even got there.

There is a threshold question: where was petitioner *until* 1996? His first post-conviction petition, the proper one, was finished by 1992. Had he wished to file another then, it too would have been properly filed; the Pennsylvania time limit did not come into effect until 1996. And had he done that, petitioner would have completed his new round of state post-conviction litigation with ample opportunity to file a timely federal habeas petition.

Petitioner's brief is entirely silent on the consequences of this delay, as if it doesn't count. But it does count. There is nothing equitable about tolling a deadline for someone

who never would have needed it but for his own failure to act, over a period of four years. It is true that he was not specifically *invited* to file a new post-conviction petition during this period, but absence of invitation is not an impediment to filing that would justify equitable tolling.

In state court petitioner eventually did make an allegation about this period of delay. His excuse there, however, fails on its face to explain away the four years. What petitioner asserted was that his personal copies of legal papers were destroyed in a prison riot – in 1989. Petitioner failed to note that, at the time, he was still in the midst of his first post-conviction review. New counsel had recently been appointed to represent him, and had just filed an amended petition. Petitioner later testified at an evidentiary hearing, with counsel, in 1991, and litigated an appeal, with counsel, through 1992.

Given the status of his case, it is most difficult to imagine how petitioner was prejudiced by the alleged loss of his personal legal file. Certainly he has never specified any harm. Nor has he ever explained why he did not just ask his lawyer for extra copies, if they were so important. In fact, he has never even said what the papers were.

But there is no need to wonder about the documents, because, when petitioner finally did file another petition, in 1996, its contents made perfectly clear that the delay was without cause. The new petition contained three claims. One was an argument that life sentences are illegal under Pennsylvania law because of the interplay of various state statutes. Since these statutes were all in existence when petitioner was sentenced in 1986, they can hardly justify petitioner's failure to mention the issue until 1996.

Next petitioner claimed his plea was invalid because he hadn't understood that he would be ineligible for parole, and his lawyer at the plea was therefore ineffective. This was a repeat of the primary claim in petitioner's first post-conviction petition, dressed up with "new" witnesses. The problem is that the witnesses were petitioner's parents and brother, and their allegations were about a meeting with counsel – and petitioner himself – that took place in 1986. Hard to argue that this was newly discovered evidence, and petitioner doesn't try.

Finally petitioner claimed that counsel on the first post-conviction petition was ineffective. The ineffectiveness charge centered on the contention that post-conviction counsel should have summoned petitioner's original lawyer to testify, at the post-conviction evidentiary hearing held in 1991, about what the lawyer told petitioner before his plea. Petitioner, of course, was at the 1991 hearing; indeed, he says, while there he specifically asked post-conviction counsel to call the prior lawyer to the stand. J.A. 191. Once again, therefore, petitioner is in no position to contend that he only discovered this ineffectiveness issue in 1996.

In reality, then, events after 1996 are an irrelevant diversion. All of the claims petitioner raised in his second petition could have been exhausted, at any time over the four years previous, without the least concern for time limits. The only reason petitioner faced the task of sorting out the new state and federal deadlines is because he did not act earlier. If "equitable tolling" can save him even from that, then the phrase has no meaning at all.

B. Petitioner was not entitled to equitable tolling where his additional state litigation, even had it been timely, would not have produced more federal claims.

This is the box petitioner tries to construct for himself: federal law told him he must pursue additional review in state court before coming to federal court; state law told him he could do so; his expectations were defeated; he is therefore entitled to equitable tolling to make things right. As discussed below, petitioner has misstated the state and federal law. But there is a more immediate problem: there was no box.

Instead there were alternative paths. Rather than jeopardize his federal habeas rights by pursuing questionable state litigation first, petitioner could have done both in parallel, or could have dropped his "new" claims to pursue in federal court the claims he had already exhausted. Petitioner never explains why he should not have had to choose, why he was entitled to have it all without risk.

One of the dangers of this mindset is illustrated here: petitioner wasted his time in state court pursuing "new" claims that could not have been brought to federal court anyway. As noted above, petitioner raised three issues in his 1996 second state post-conviction petition.

The first was his argument that state law required parole even for life sentences. When petitioner initially made this contention, he put it in federal terms as well: he said that, because the life sentence violated state statutes, it thereby violated federal due process. J.A. 192. When he appealed from denial of the 1996 petition, however, petitioner abandoned the federal aspect of the claim in order to concentrate on the state law issue, which, he argued,

was "non-waivable." J.A. 256-66. When he sought discretionary review in the state supreme court, petitioner again presented the illegal sentence claim in purely state law terms. J.A. 342-53. Even if he had been timely, therefore, the only issue that would have been fairly presented through the state court system was non-cognizable on federal habeas review.

The second of the three claims in petitioner's 1996 post-conviction petition was his challenge to the validity of his plea and the effectiveness of his trial counsel. This surely was a federal issue. But it had already been exhausted, by petitioner's first state post-conviction petition, which was done in 1992. To be sure, petitioner attempted to add "new" evidence the second time around. But, even had there been no time limit, he could not have used the second petition to relitigate the guilty plea/ineffectiveness claim on the basis of facts that were plainly available years before. *See, e.g., Commonwealth v. Pirela*, 726 A.2d 1026, 1031-32 (Pa. 1999) (where defendant previously challenged validity of jury waiver colloquy, he could not relitigate issue on collateral review on basis of new affidavit).

The final claim in the 1996 post-conviction petition was an ineffectiveness attack against counsel in petitioner's previous round of state collateral review. However, there is no such claim on federal habeas review. 28 U.S.C. § 2254(i).

Accordingly, petitioner could not in fact have gotten anywhere by going back to state court in 1996, even if the state filing deadline had not applied. He could not have exhausted additional claims for federal review. Because he thought he should not have to choose, he let the federal deadline pass. Equitable tolling should not be employed to vindicate that kind of litigation conduct.

C. Petitioner was not entitled to equitable tolling where he ignored the state filing deadline, and delayed filing his federal habeas petition, on the ground that the state statute was not sufficiently "clear" until every possible argument against it had been eliminated by the highest court.

Petitioner contends that the state courts lured him into believing he was immune from the state post-conviction filing deadline. The federal courts, he claims, egged him on. Even in the light most favorable for himself, however, petitioner can say no more than things like this: "it was not at all clear" that his new state petition was untimely; it affirmatively appeared that he "might" get more state merits review; state law "left open the possibility" that additional exceptions would apply. Brief for Petitioner at 21, 40.

Of course, if it was not clear that he was untimely, then it was not clear that he was timely. If he might get more review, then he might not. If the law left open the possibility of exceptions, then it also left open the possibility of no exceptions.

The reality is that, once the state deadline was enacted, the news was not good for defendants seeking more rounds of post-conviction review. With each subsequent legal development, the news got worse. Yet petitioner ignored every one. At any of these stages, petitioner could have eliminated the threat to his federal rights of review by filing a habeas petition – whether or not he withdrew his rapidly diminishing hopes in state court. Equitable tolling is not an umbrella policy to protect litigants from known risk.

The first and loudest message, of course, came when the legislature passed the new post-conviction time limit in November 1995, after many months of hearings and debate. Petitioner let pass the 60-day grace period for previous litigants, instead waiting for good measure until November 1996 to file his new post-conviction petition. Petitioner has *never* claimed ignorance of the filing deadline (which wouldn't have warranted tolling in any case). On the contrary, his explanation has been all along that he filed late because he had legal arguments that the courts might accept to exempt him from the deadline. As he declared in his briefs, he therefore "did not feel compelled to immediately file his current PCRA petition, especially since he was unprepared to do so" (because of those legal papers he lost seven years earlier). J.A. at 320-21, 341, 411.

Whatever petitioner's theories may have been, however, the legal system was marching on. In May 1996, the Pennsylvania Supreme Court's criminal rules committee published a proposal to incorporate the new deadline into the procedural rules governing post-conviction petitions. 26 Pa. Bull. 2296. In August 1997 the state supreme court officially adopted the published rules. 27 Pa. Bull. 4298. Of course the new rules did not explicitly exclude every possible argument against application of the time limit. But for those, like petitioner, claiming to rely on the court's supposed history of circumventing statutory provisions, the rule change was not a good sign.[15]

[15] In his statement of the case, Petitioner misleadingly suggests that the new rules were somehow unclear about the filing deadline. Brief for Petitioner at 7. His appendix includes only the old, pre-deadline rules, which of course do not mention the time limit. As amended, however, Pa. R. Crim. P. 1501 (now renumbered as 901),

(Continued on following page)

Then in December 1997, the Pennsylvania Superior Court – the intermediate appellate court – issued the first published opinion applying the new filing deadline. The court made clear what had been apparent on the face of the statute: that the time limit was not like existing procedural bars; that it was jurisdictional; that the courts were without power to disturb the legislative scheme. *Commonwealth v. Alcorn*, *supra*, 703 A.2d at 1057.

Even at that point, however, petitioner did not reconsider his strategy of staying in state court and delaying a federal habeas petition. Instead, he insisted that *Alcorn* did not apply to already-filed petitions attacking convictions that became final before enactment of the new filing deadline. J.A. 302, 305. But that is exactly what the court in *Alcorn* did: it applied the deadline to a previously filed petition challenging a previously final conviction. *Id*. at 1055.

Today petitioner argues that he could safely ignore *Alcorn*, because the intermediate court's ruling was not the last word on validity of the filing deadline. Actually, though, the Pennsylvania Supreme Court has only discretionary review over non-capital cases, and in fact denied review in *Alcorn* in June 1998. *Commonwealth v. Alcorn*, 724 A.2d 348 (Pa. 1998) (mem.). For all petitioner knew,

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clearly states that "[a] petition for post-conviction collateral relief shall be filed within one year of the date the judgment becomes final, except as otherwise provided by statute."

In any case, to reiterate, petitioner has *never* claimed ignorance of the time limit – whether in relation to the statute itself, the language of the one-year grace period provision, the content of the rules of procedure, or the terms of the standard PCRA form. That is apparently why all of these insinuations appear only in his statement of the case, and not in his argument section.

the Superior Court was indeed the last word; he just chose not to heed it.

Petitioner responds that he could not simply abandon his petition, even once the state courts indicated it would be rejected as untimely, because he had to present his claims to all levels of the court system in order to properly exhaust them. Brief of Petitioner at 46 n.36. This is a non sequitur that goes to the heart of petitioner's position. Because the post-conviction petition was in violation of the jurisdictional time limit, it *couldn't* serve to exhaust claims – no matter how long petitioner spun them around in state court. Petitioner simply chose not to protect himself by filing in federal court on his previously exhausted claims. Now he expects this Court to absolve him of his blind wager.

In any case, petitioner's subsequent behavior shows that he was not about to take heed from the Pennsylvania Supreme Court anyway. In December 1998, six months after denying review in *Alcorn*, the state supreme court issued its own opinion applying the filing deadline as a limit on the jurisdiction of the courts. *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998). Petitioner says he could disregard that decision too, because it did not explicitly reject all the excuses previously used to step around non-jurisdictional procedural bars. Petitioner was free to look at it that way if he wished – but only at his own risk.

Finally, in August 1999, the state supreme court issued an opinion apparently good enough for petitioner. In *Commonwealth v. Fahy*, 737 A.2d 214 (Pa. 1999), the court rejected a laundry list of purported non-statutory exceptions to the filing deadline. The court pointed out, as had the *Alcorn* court two years before, that statutory, jurisdictional time limits cannot be modified by judges.

In pretending good faith reliance on this new decision, however, petitioner overlooks several facts. First, by this point the state supreme court had already denied review of the untimeliness ruling in petitioner's *own* case. Surely that might have been an indication of whether the court would spare him from the post-conviction time limit.

Moreover, petitioner dragged his feet even after the *Fahy* case. Once that decision came down, even he realized, he says, that his petition was jurisdictionally out of time – meaning that it had never been properly before the state courts, and that the federal habeas deadline had not been tolled. Rather than rush to invoke his federal rights, however, petitioner dallied for another five months before he filed a habeas petition, in which he merely retyped the allegations in his state court filings.

Finally, petitioner's filings had challenged the time limit not just on state law grounds, but as a violation of the Due Process Clause of the Fourteenth Amendment. J.A. 307, 338-39, 415-16. If petitioner really thought he was entitled to equitable tolling until the highest court delivered the "last word" on all possible arguments, he should still be waiting for "clarity." The truth is that Pennsylvania law did not cause petitioner's delay. He just missed the deadline.

Nor is Third Circuit precedent to blame for petitioner's lateness. According to petitioner, he was entitled to ignore Pennsylvania law about its own time limit, because the Third Circuit kept telling him the state courts might well not enforce the deadline. This is bunkum.

Petitioner first invokes *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996). But *Doctor* was a case that came to federal court a year before the Pennsylvania filing deadline was even enacted. It couldn't have told petitioner anything

about whether he would be able to get around the state time limit.

Next petitioner cites *Banks v. Beard*, 126 F.3d 206 (3d Cir. 1997). *Banks*, however, focused exclusively on the Pennsylvania Supreme Court's treatment of procedural bars in *capital* cases. Beyond that it merely directed litigants back to state law on the filing deadline as it developed. *Banks* did not remotely suggest that petitioner could disregard state cases like *Commonwealth v. Alcorn*, the first Pennsylvania opinion on the filing deadline; indeed, *Banks* was decided three months before *Alcorn* even appeared.

Petitioner also relies on *Lambert v. Blackwell*, 134 F.3d 506 (3d Cir. 1997). But *Lambert* specifically contrasted Pennsylvania's non-jurisdictional procedural bars, which had long been on the books, with the new jurisdictional filing deadline. Indeed, in a passage that petitioner carefully doctors in his brief, *Lambert* commented on the state courts' willingness to depart from statutory language only in relation to "the *prior* statute which did *not* contain a statute of limitations." *Id*. at 524 n.33 (emphasis supplied).

These early cases hardly stand for the proposition that petitioner was entitled to pursue an untimely state petition for three years, from 1996 to 1999, and then expect a free pass into federal court. Indeed the Third Circuit later held that any possible confusion about the state filing deadline was cleared up by the state court's *Alcorn* decision in 1997, and that equitable tolling of the federal habeas deadline was unavailable thereafter. *Walker v. Frank*, 56 Fed. Appx. 577 (3d Cir. 2003) (not precedential) (Becker, C.J.).

The real problem with petitioner's false reliance on federal cases, and with his equitable tolling demand

generally, is his expectation that exhaustion trumps all. Petitioner did not have some kind of constitutional right to delay federal habeas proceedings in order to exhaust more claims in state court. On the contrary: exhaustion is a Congressional mandate, and it exists to protect the interests of the state, not the petitioner. By enacting post-conviction statutes of limitations, Congress and the states chose to *change* things. They did not *want* to provide endless opportunities for exhaustion anymore, because the cost of delay was too high. Equitable tolling for petitioner is nothing but an end run around those legislative policies. His claim should be denied.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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