

No. 06-1680
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

RICHARD ALLEN, Commissioner,
Alabama Department of Corrections,
Petitioner,

v.

DANIEL SIEBERT,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

**BRIEF OF RESPONDENT
IN OPPOSITION TO CERTIORARI**

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QUESTION PRESENTED

(Capital Case)

Whether *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), requires reversal of the Eleventh Circuit's decision in *Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007), upholding as consistent with *Pace* its own prior holdings in *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003), that the "firmly established and regularly followed" standard applies to procedural rules governing filing in the context of tolling the statute of limitations for federal habeas under 28 U.S.C. §§ 2244(d)(1) and 2244(d)(2) and that Alabama's post-conviction statute of limitations was not firmly established and regularly followed at the time Respondent Daniel Siebert's state post-conviction petition was held untimely in state court?

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INTRODUCTION

In the decision below, the Eleventh Circuit, on return to remand, upheld its prior holding that post-conviction statutes of limitations, like other procedural rules, must be “firmly established and regularly followed” to constitute “proper” filing rules that will bar tolling of a petitioner’s federal statute of limitations. The Eleventh Circuit concluded that this Court’s decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), did not overrule this holding. The history of Respondent Daniel Siebert’s case illustrates why this Court should agree with the Eleventh Circuit and decline to review its decision.

Daniel Siebert was convicted of capital murder on March 19, 1987. *See Siebert v. State*, 778 So. 2d 842, 844-45 (Ala. Crim. App. 1999). The Alabama Court of Criminal Appeals affirmed the conviction and sentence on April 14, 1989, *Siebert v. State*, 562 So. 2d 586 (Ala. Crim. App. 1989), and the Alabama Supreme Court affirmed on March 30, 1990, *Ex parte Siebert*, 562 So. 2d 600 (Ala. 1990). The Alabama Court of Criminal Appeals issued a certificate of judgment on May 22, 1990, *see Siebert*, 778 So. 2d at 846, but Mr. Siebert never received a copy of this document. This Court denied certiorari on November 5, 1990. *Siebert v. Alabama*, 498 U.S. 963 (1990).

In the meantime, the Alabama Supreme Court adopted its first rules of criminal procedure, including Temporary Rule 20, the predecessor of the current Rule 32, Alabama Rules of Criminal Procedure. *See Taunton v. State*, 562 So. 2d 614 (Ala. Crim. App. 1989). Temporary Rule 20, for the first time, imposed a statute of limitations for post-conviction pleadings. *Id.* at 614-15. That statute of limitations was two years until a revision adopted in 2002, which shortened the time to one year. *See* Court Comment of January 27, 2004, to Rule 32.2, Alabama

Rules of Criminal Procedure. The effective date of the Temporary Rule 20 was April 1, 1987, with all persons convicted before the effective date accorded a full two years to file. *See* Temp. R. 20.2(c), Ala. R. Crim. P. *See also Ex parte Rice*, 565 So. 2d 606, 607 n.2 (Ala. 1990). Thus, the first post-conviction petitions subject to a timeliness challenge would have to be *filed* (but, of course, not yet appealed) on or after April 1, 1989. Temporary Rule 20 became Rule 32 without alteration on January 1, 1991. *See Ex parte Jackson*, 598 So. 2d 895, 898 n. 1 (Ala. 1992). The significance of this historical sidenote for this case is that, at the time Mr. Siebert filed his Rule 32 petition in 1992, few capital post-conviction petitions had passed through the review process, and the rules governing the operation of the statute of limitations were in flux.

Mr. Siebert filed a post-conviction petition under Rule 32, on August 25, 1992, *Siebert*, 778 So. 2d at 846, within two years of completion of his direct review, as calculated from this Court's denial of certiorari. *See Daniels v. State*, 650 So. 2d 544, 550 (Ala. Crim. App. 1994) ("The appellant's conviction and sentence became final, for purposes of direct appeal, on January 23, 1989, when the United States Supreme Court denied certiorari review./The appellant filed his petition pursuant to Rule 32, A[la]. R. Crim. P., on March 20, 1990"). Three years later, on April 4, 1995, the second day of an evidentiary hearing, the State of Alabama first raised a statute of limitations defense, alleging that Mr. Siebert was required to file within two years of the conclusion of direct review in *state* court, i.e., upon the issuance of a certificate of judgment by the Court of Criminal Appeals after affirmance by the Alabama Supreme Court, *Siebert*, 778 So. 2d at 846, a document which the courts did not send to Mr. Siebert himself, *see App.* at 14a. The State did not raise this timeliness defense on the basis of any new information not available to it at the time Mr. Siebert first filed his petition; rather, the State had simply overlooked it, despite

filing an Answer raising every type of procedural default challenge. Tab #R-37 at 181-97.¹ However, the State, in its Amended Answer, asserted that the statute of limitations was a jurisdictional rule and, so, could be raised at any time. Tab #R-40 at 539-41.

The Rule 32 trial court took the timeliness issue under advisement, then waited another three years, until December 29, 1998, to determine that Mr. Siebert's petition was untimely filed and, therefore, due to be dismissed. *See Siebert*, 778 So. 2d at 846. The trial court, adopting verbatim a proposed order submitted by the State, *id.*, ruled that, if Mr. Siebert could amend his petition, the State could amend its answer,² *id.* at 848, making no distinction between the *Brady* claims³ raised by Mr. Siebert's amendment and based on new information derived from discovery he received in response to a discovery order issued on December 5, 1994, *see* Tab #R-37 at 348-57, and a statute of limitations defense available to the State at the time it first filed its answer.

On appeal, the Court of Criminal Appeals upheld the trial court's ruling, finding that the State's statute of limitations defense "related back" to its original answer. *Siebert*, 778 So. 2d at 848. The principle of "relation back" had never before been applied in Rule 32 proceedings to excuse failure to raise the statute of limitations, nor did the Court of Criminal Appeals explain

¹Citations are taken from the Respondent's [State's] Habeas Corpus Checklist, *Siebert v. Haley*, No. 1:01-CV-02323-IPJ-TMP (N.D. Ala. filed Sept. 14, 2001) (Doc. # 10).

²The trial court cannot truly be said to have accepted Mr. Siebert's amendment when it barred the petition, amendments and all, as untimely.

³*Brady v. Maryland*, 378 U.S. 83 (1963).

how the statute of limitations “related back” to the State’s original answer.⁴ In *Garrett v. State*, 644 So. 2d 977, 980-81 (Ala. Crim. App. 1994), the Court of Criminal Appeals held that a petitioner’s amendment “related back” only because it raised no new claims. Similarly, in later opinions where the Court of Criminal Appeals applied “relation back” in the Rule 32 context, it did so to bar prisoners’ claims as unrelated to their original petitions.⁵ See *Giles v. State*, 906 So. 2d 963, 973 (Ala. Crim. App. 2004); *McWilliams v. State*, 897 So. 2d 437, 446 (Ala. Crim. App. 2004); *Jenkins v. State*, – So. 2d –, 2004 WL 362360, at *2 (Ala. Crim. App. Feb. 27, 2004); *DeBruce v. State*, 890 So. 2d 1068 (Ala. Crim. App. 2003); *Charest v. State*, 854 So. 2d 1102, 1104-6 (Ala. Crim. App. 2002). The Court of Criminal Appeals, in denying Mr. Siebert relief, also ignored its own prior holding in *Jackson v. State*, 612 So. 2d 1356 (Ala. Crim. App. 1992), wherein it upheld a trial court’s refusal to accept a statute of limitations defense raised by the State on the last day of an evidentiary hearing. The Alabama Supreme Court denied certiorari review on September 15, 2000. *Ex parte Siebert*, 778 So. 2d 857 (Ala. 2000).

While Mr. Siebert’s state post-conviction petition was awaiting a ruling in the trial court, Congress passed the Anti-terrorism and Effective Death Penalty Act (AEDPA), imposing a one-year statute of limitations on federal habeas petitions, with an effective date of April 24, 1996. The Eleventh Circuit adopted the position that petitioners whose state post-conviction proceedings concluded before the effective date of AEDPA had the full one year to file in federal

⁴The doctrine of “relation back” in civil law is “designed to ‘heal’ violations of the statute of limitations” for the plaintiff. see *City of Birmingham v. Davis*, 613 So. 2d 1222, 1224 (Ala. 1992), not to permit the defendant to overcome failure to raise the statute of limitations defense at the proper time.

⁵All of the following cases have been overruled by *Ex parte Jenkins*, – So. 2d –, 2005 WL 796809 (Ala. April 8, 2005).

court. *Wilcox v. Florida Dept. of Corr.*, 158 F.3d 1209, 1211 (11th Cir. 1998). The Eleventh Circuit did not, however, revise its policy of dismissing petitions with unexhausted claims by adopting the “stay and abeyance” practice employed in other circuits.⁶ Nor was it clear at the time AEDPA’s statute of limitations went into effect what distinctions would be made between petitions that were filed, versus “properly filed,” for tolling purposes.

Mr. Siebert filed a habeas petition under 28 U.S.C. § 2254 in the Northern District of the State of Alabama on September 14, 2001. *Siebert v. Campbell*, 334 F.3d 1018, 1021 (11th Cir. 2003) (*Siebert I*). That petition, and its timeliness, are the subject of this appeal.

The State asserts, incorrectly, that “all agree” that Mr. Siebert’s state post-conviction petition was untimely filed. *See* Pet. at 2. *See also* Pet. at 12, 14, 21, 22. Mr. Siebert does not concede this point, but even if his petition was untimely, Alabama applied its statute of limitations inconsistently at the time of Mr. Siebert’s post-conviction proceedings, devising new rules *ad hoc* to bar his claims from review. Federal courts are not bound to defer to state rules which are not firmly established and regularly followed, as here. Alternatively, even if this Court were to determine that the standards applicable to procedural rules for procedural default purposes do not apply to rules governing filing, the equities in this case, nonetheless, weigh in favor of Mr. Siebert for the same reasons.

STATEMENT OF THE CASE

A. Facts and State Court Proceedings

⁶A search for “stay and abeyance” in Eleventh Circuit cases on Westlaw for the dates between January 1, 1995, and December 31, 2001, returns no results. As late as 2003, the Eleventh Circuit indicated no approval of the stay and abeyance procedure. *Thompson v. Secretary for Dept. of Corrections*, 320 F.3d 1228, 1229-30 (11th Cir. 2003), *vacated by* 544 U.S. 957 (2005).

Mr. Siebert does not contest the first paragraph.

Mr. Siebert filed his Rule 32 petition on August 25, 1992, *Siebert*, 778 So. 2d at 846, within two years of this Court's denial of certiorari on November 5, 1990, *Siebert*, 498 U.S. at 963. Rule 41(b) of the Alabama Rules of Criminal Procedure states (ambiguously) that issuance of a certificate of judgment will be stayed upon "timely filing of a petition for certiorari in the Supreme Court." In *Daniels*, the Alabama Court of Criminal Appeals stated that direct review concludes upon denial of certiorari by this Court. 650 So. 2d at 550. From this point-of-view, Mr. Siebert's Rule 32 petition was timely. Mr. Siebert argued this issue throughout his state court proceedings. Tab #R-40 at 558-62 (Petitioner's Opposition and Memorandum of Law to State's Motion to Dismiss and Motion to Amend Answers); Tab #R-43 at 13-16 (Brief of Appellant to Court of Criminal Appeals); Tab #R-47 at 11-14 (Petition for Writ of Certiorari to the Alabama Supreme Court).

The evidentiary hearing, *see* Pet. at 4, took place three years after Mr. Siebert initially filed his Rule 32 petition, in April of 1995, *Siebert*, 778 So. 2d at 846. In the midst of this hearing, the State of Alabama first raised a statute of limitations defense. *Id.* This amendment was not based on any new information that had only recently become available to the State and its acceptance conflicts directly with the usual practice in Alabama relative to affirmative defenses. *See* Tab #R-40 at 539-41 (State's Amended Answer). The trial court, in adopting the State's argument that the statute of limitations was not waived by failing to plead it in its first responsive pleading, cited to no authority permitting such a defense to be raised through amendment. Tab #R-40 at 879-80. Acceptance of the amendment also contradicted a Court of Criminal Appeals opinion addressing a similar situation. *See Jackson*, 612 So. 2d at 1357

(raising statute of limitations during evidentiary hearing did not bar merits review).

The circuit court, in alternatively holding that Mr. Siebert's claims were "without merit," *see* Pet. at 4, gave no explanation why his claims were not meritorious, Tab #R-40 at 881.

The Court of Criminal Appeals affirmed the circuit court's dismissal for timeliness, *see* Pet. at 5, on the grounds that the State's amendment "related back" to its original answer, *Siebert*, 778 So. 2d at 848. Such a rule had never before been applied to a statute of limitations in Rule 32 proceedings, nor does Alabama civil practice permit such all-encompassing "relation back." (See discussion in Introduction above.) The Alabama Supreme Court, having only recently pronounced that Rule 32's statute of limitations is an affirmative defense, *Ex parte Ward*, – So. 2d –, 2007 WL 15760054 (Ala. June 1, 2007), has yet to indicate when such a defense is raised too late. That court's opinion in *Ex parte Clemons*, – So. 2d –, 2007 WL 1300722, at *4 (Ala. May 4, 2007) ("Whether the trial court's authority [to dismiss *sua sponte*] continues after service of an answer omitting a defense is a question not before us"), however, indicates that a trial court's ability to raise procedural bars *sua sponte* may end once the State files its answer, suggesting also that there may be some limit as to when the statute of limitations can be pled.

B. Federal Court Proceedings

1. "Siebert I"

a. *District Court.* Mr. Siebert has not waived the issue of equitable tolling. *Cf.* Pet. at 6 n.6; *see also* Pet. at 12 n.11.⁷ Mr. Siebert asserted below, and still maintains, that he never received a copy or notice of the certificate of judgment issued by the Alabama Court of Criminal

⁷The State raised the issue of equitable tolling in its Motion to Dismiss, *Siebert v. Haley*, No. 1:01-CV-02323-IPJ-TMP (N.D. Ala. filed Sept. 14, 2001) (Doc. # 9 at 4-5).

Appeals. *See* Petitioner's Response to Motion to Dismiss, *Siebert v. Haley*, No. 1:01-CV-02323-IPJ-TMP (N.D. Ala. filed Sept. 14, 2001) (Doc. # 12 at 2). The unsettled state of Alabama's law respecting the character of Rule 32's statute of limitations is itself sufficient grounds for equitable tolling. *See id.* at 7-17. *See also, e.g.*, this Court's comment in *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (reserving the question whether exhaustion requirements, for example, might have created grounds for equitable tolling).

b. *Eleventh Circuit.* The State completely misrepresents the holding of the Eleventh Circuit in *Siebert I*, *see* Pet. at 6-7, by omitting any reference to its core holding, that statutes of limitations, like other procedural rules, must be "firmly established and regularly followed" to operate as a bar on federal review in the tolling context as well as the procedural default context. *See* discussion below under Reasons, Sections 1-3. The State did not petition for certiorari review of this decision.

2. "Siebert II"

a. *District Court.* The case "lay dormant" awaiting instructions from the court as to the next stage of the proceedings. *See* Pet. at 7. Neither Mr. Siebert nor the Eleventh Circuit has ever contended that only jurisdictional rules qualify as "conditions of filing" (filing rules include such matters as verification of a petition, for example). *See* Pet. at 8.³

b. *Eleventh Circuit.* The State again misstates the holding of the Eleventh Circuit on return to remand. *See* Pet. at 8-9. The statement respecting affirmative defenses is dictum as to

³Similarly, Mr. Siebert's statement quoted at Pet. 17 means only that he cannot say whether only a jurisdictional statute of limitations, and no other kind, would qualify as a filing condition because he does not know what all the possible permutations of such rules might be. This is not a concession that defensive statutes of limitations do so qualify.

Mr. Siebert. See below under Reasons, Section 1. Mr. Siebert did raise the issue of equitable tolling in his initial brief to Eleventh Circuit in the prayer for relief. Brief of Appellant, *Siebert II*, at 21. Cf. Pet. at 6 n. 6; 12 n. 11.

REASONS FOR DENYING THE WRIT

1. **The State has misstated the issue that would be before this Court on appeal of the Eleventh Circuit's decision in *Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007).**

The Eleventh Circuit's decision, which the State appeals to this Court, must be understood in the context of the procedural posture of this case when that decision was rendered. The decision in *Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007) (*Siebert II*), now on appeal is a ruling on return to remand. The core holding in this opinion is that "the law of the case applies." *Id.* at 1090. The law of the case is the Eleventh Circuit's decision in *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003) (*Siebert I*). There the Eleventh Circuit held that state statutes of limitations, like other procedural rules, must be "firmly established and regularly followed" to bar federal review, whether in the tolling context or the procedural default context, *id.* at 1025, and that Alabama's post-conviction statute of limitations, during the pertinent period, did not have any clear method of operation, that is, it was not "firmly established and regularly followed," *id.* at 1025-29. The *Siebert I* court further described the application of Alabama's statute of limitations as "discretionary" and noted that it could find no other examples of a statute of limitations applied in such a fashion. *Id.* at 1029-30. Nowhere in *Siebert I* did the Eleventh Circuit state that Alabama's statute of limitations was definitively established as an affirmative defense. In *Siebert II*, the Eleventh Circuit held that its prior ruling in *Siebert I* was not overruled

by this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), 480 F.3d at 1090. Thus, the question that would fairly be before this Court on certiorari review would be whether the above-stated holding in *Siebert I* is consistent with this Court's opinion in *Pace*.

In summarizing the Eleventh Circuit's decision in *Siebert I*, the State makes no mention of the "firmly established and regularly followed" holding whatsoever. See Pet. 5-7. Numerous subsequent panels of the Eleventh Circuit have summarized *Siebert I* as Mr. Siebert has above: *Siebert v. Allen*, 455 F.3d 1269, 1271 (11th Cir. 2006) ("This Court, however, reversed, holding that in the context of § 2244(d)(2)'s tolling provision, 'a rule governing filings must be "firmly established and regularly followed" before noncompliance will render a petition improperly filed for the purposes of AEDPA's tolling provision,' and that Alabama's Rule 32.2(c) did not meet that requirement. *Siebert v. Campbell*, 334 F.3d 1018, 1025 (11th Cir. 2003) ("*Siebert I*")"; *Estes v. Chapman*, 382 F.3d 1237, 1239 (11th Cir. 2004) ("See *Siebert v. Campbell*, 334 F.3d 1018, 1025 (11th Cir. 2003) ('[W]e conclude that a rule governing filings must be "firmly established and regularly followed" before noncompliance will render a petition improperly filed for purpose of AEDPA's tolling provision.')"); *Waade v. Battle*, 379 F.3d 1254, 1279 (11th Cir. 2004) ("The *Siebert [v. Campbell]*, 334 F.3d 1018, 1025 (11th Cir. 2003) Court then stated: 'Accordingly, we conclude that a [state] rule governing filings must be "firmly established and regularly followed" before noncompliance will render a petition improperly filed for the purpose of AEDPA's tolling provision'"); *Sykosky v. Crosby*, 187 Fed. Appx. 953, 958 n.3 (11th Cir. 2006) (unpub. op.) ("'[A] rule governing filings must be "firmly established and regularly followed" before noncompliance will render a petition improperly filed for purposes of AEDPA's tolling provision.' See *Siebert v. Campbell*, 334 F.3d 1018, 1025 (11th Cir. 2003) (per

curiam) (citation omitted)"); *Colbert v. Head*, 146 Fed. Appx. 340, 344 (11th Cir. 2005) (unpub. op.) ("after determining that the state rule at issue was not 'firmly established and regularly followed' at the time of the petitioner's state habeas filing, we concluded in *Siebert [v. Campbell]*, 334 F.3d 1018 (11th Cir. 2003)] that the rule should not be given deference. *Id.* at 1025-29"). The State relegates any mention of this core holding of *Siebert I* to a footnote and frames it only as argument by Mr. Siebert.⁹ Pet. at 17 n.12.

In *Siebert I*, the Eleventh Circuit did *not* find that Mr. Siebert's state post-conviction petition was properly filed for federal purposes, tolling the federal statute of limitations, on grounds that Alabama's statute of limitations operated as an affirmative defense, as the State's "question presented" would suggest. The phrase from *Siebert II* which the State seizes upon to frame its "question presented," "to wit: a statute of limitations that operated as an affirmative

⁹The State, instead of quoting the holding from *Siebert I* itself, cites to a reinterpretation of that case in an opinion issued by a different and subsequent panel of the Eleventh Circuit. In *Hurth v. Mitchem*, 400 F.3d 857, 861 (11th Cir. 2005), a later panel limited *Siebert I*'s holding by drawing the conclusion that the *Siebert I* panel found Alabama's statute of limitations to be not firmly established and regularly followed for tolling purposes only because it was not jurisdictional. The *Hurth* panel further held that Alabama's post-conviction statute of limitations *was* firmly established and regularly followed as a "discretionary" rule for procedural default purposes, *id.* at 862-63, but only by ignoring the Court of Criminal Appeals' own admission that the rule had not been applied consistently prior to its decision in *Williams v. State*, 783 So. 2d 811 (Ala. Crim. App. 2000), a case post-dating its decision in Mr. Siebert's case. Thus, *Hurth* held that the same statute of limitations could be both firmly established and not firmly established at the same time. The *Siebert I* panel made no such finding. Insofar as *Siebert I* and *Hurth* conflict, the Eleventh Circuit's own prior panel precedent rule requires that the later decision, *Hurth*, give way. *United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir. 2004); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) ("It is the firmly established rule of this circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court") (internal quotation marks and citation omitted). The State argued before this Court in Mr. Siebert's parallel case, *Siebert v. Allen*, – U.S. –, 127 S. Ct. 1823 (March 19, 2007) (No. 06-8808), that any conflict between *Siebert I* and *Hurth* is an internal matter for resolution by the Eleventh Circuit, Brief in Opposition at 9-10.

defense,” 480 F.3d at 1090, is, thus, dictum as applied to Mr. Siebert.

2. **The Eleventh Circuit’s opinion in *Siebert v. Allen* does not conflict with this Court’s decision in *Pace v. DiGuglielmo*.**

This Court, in *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005), held that Pennsylvania’s statute of limitations, despite enumerated exceptions, is not ineffective against 28 U.S.C. § 2244(d)(2)’s tolling provision: “the question we face here [is]: ‘whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed.’ . . . we see no grounds for treating the two differently.” At the time when Mr. Siebert’s petition was pending in state court (as now), Alabama’s statute of limitations similarly had exceptions to its then two-year filing requirement. Ala. R. Crim. P. 32.2(e). Under *Pace*, those exceptions, in and of themselves, would not allow federal courts to withhold deference to state court rulings on timeliness. However, the *Siebert I* court was not concerned with the enumerated exceptions to Alabama’s statute of limitations (because that was not the issue before it), but with inconsistent application of the time bar and ad hoc explanations for those inconsistencies. 334 F.3d at 1029-30 (distinguishing Alabama’s permissive application of its statute of limitations from mandatory exceptions). Therefore, the holding of *Pace* does not overrule *Siebert I*, and its affirmance in *Siebert II*, because it addresses a different issue.

This Court, in *Pace*, did not decide the point at issue in *Siebert I* and affirmed by *Siebert II*, because the *Pace* Court was not presented with the same “facts and circumstances.” See *Moore v. Campbell*, 344 F.3d 1313, 1319 (11th Cir. 2003) (*overruled on other grounds*) (“a case is authority only for what it decides”) (citation omitted); *United States v. Hunter*, 172 F.3d 1307, 1310 (11th Cir. 1999) (Carnes, J., concurring) (“The holdings of a prior decision can reach only

as far as the facts and circumstances presented to the Court in the case which produced the decision”). In *Siebert I*, the Eleventh Circuit held that Mr. Siebert’s federal habeas petition was “properly filed” for purposes of § 2244(d)(2) because “Siebert’s non-compliance with Rule 32’s time bar . . . was treated by the Alabama courts as immaterial to their own authority to act upon his claims [and thus] did not render his post-conviction applications ‘[im]properly filed.’” 334 F.3d at 1032 (second brackets in original). The court premised this holding on its conclusion that the “firmly established and regularly followed” standard “applies to state procedural rules in the ‘properly filed’ inquiry under § 2244(d)(2)”: “we conclude that a rule governing filings must be ‘firmly established and regularly followed’ before noncompliance will render a petition improperly filed for the purpose of AEDPA’s tolling provision.” *Id.* at 1025. These conclusions were affirmed in *Siebert II* and are not abrogated by *Pace*.

In *Pace*, this Court ruled that statutes of limitations are “conditions of filing,” not “conditions for obtaining relief.” 544 U.S. at 417. Exceptions to statutes of limitations, as in the Pennsylvania post-conviction statute at issue in *Pace*, do not convert them into “conditions for obtaining relief.” *Id.* at 413. Exceptions, however, are not the same thing as nonjurisdictional character or inconsistent application. As the Eleventh Circuit explained in another case interpreting *Siebert I*,

[t]his Court in *Siebert I* [I] did not determine that judicially created exceptions caused Alabama Rule 32.2(c) to be discretionary. 334 F.3d at 1031. In *Siebert I*, the Alabama courts had not clearly defined exceptions to Rule 32.2(c). Instead, the Alabama courts determined on an ad hoc basis when to exercise jurisdiction over a habeas petition and when not to exercise jurisdiction. *Id.*

Wade v. Battle, 379 F.3d 1254, 1264, n. 8 (11th Cir. 2004).

The substance of the Eleventh Circuit’s findings in *Siebert I* was that Alabama’s statute

of limitations for post-conviction petitions was not consistently applied: “we believe the jurisdictional¹⁰ character of Rule 32’s time bar did not meet this [“firmly established and regularly followed”] standard at the time of Siebert’s post-conviction proceedings.” 334 F.3d at 1025. The Eleventh Circuit framed the crux of the matter as a distinction between the pre-*Williams v. State*, 783 So. 2d 135 (Ala. Crim. App. 2000), and post-*Williams* character of Alabama’s statute of limitations. Before *Williams*, the Eleventh Circuit said (following *Williams* itself), Alabama’s statute of limitations was not jurisdictional, because, for example, trial courts had discretion to entertain out-of-time petitions. *Siebert I*, 334 F.3d at 1029. In *Williams*, the Alabama Court of Criminal Appeals decreed that henceforth the statute of limitations is jurisdictional and cannot be waived. 783 So. 2d at 137. In discussing the state of Alabama’s statute of limitations up to that time, the Eleventh Circuit noted that the statute of limitations had been treated sometimes (but not always) as an affirmative defense, not as a jurisdictional bar by the Court of Criminal Appeals itself. *Siebert I*, 334 F.3d at 1026-27, citing *Jackson v. State*, 612 So. 2d 1356, 1357 (Ala. Crim. App. 1992) (“Generally, the statute of limitations is an affirmative defense that must be affirmatively pleaded or it is waived”); *Howard v. State*, 616 So. 2d 398, 398-99 (Ala. Crim. App. 1993) (statute of limitations must be pled by the State).

In Mr. Siebert’s own state court case, the Court of Criminal Appeals did not make a

¹⁰The State argued below, and in state court, that Rule 32’s statute of limitations is jurisdictional. See, e.g., Respondent’s Answer to Siebert’s Petition for Writ of Habeas Corpus, *Siebert v. Haley*, No. 1:01-CV-02323-IPJ-TMP (N.D. Ala. filed Sept. 14, 2001) (Doc. # 8 at 3, 5, 7, 9, 11, 13, 14, 16, 18, 20, 22, 24, 26, 27, 29, 32, 33); State’s Amended Answer and Motion to Dismiss, Tab #R-40 at 539-40; State’s Brief on Appeal to the Alabama Court of Criminal Appeals, Tab #R-44 at 19-20. The Eleventh Circuit’s qualification here means only that consistent application of the time bar as a jurisdictional rule, as argued by the State, had not yet begun while Mr. Siebert was in state court.

definitive statement as to the character of the statute of limitations, but instead said that because the State had raised the issue in the trial court, though not in its first pleading (and, in fact, three years after the initiation of proceedings), that defense would “relate back” to the State’s first answer. *Siebert v. State*, 778 So. 2d 842, 847-48 (Ala. Crim. App. 1999). This was the first time any such “relation back” ruling had been applied to Rule 32’s statute of limitations. It was a purely ad hoc decision, *see Wade*, 379 F.3d at 1264 n. 8, to bar consideration of the merits of Mr. Siebert’s petition. Even at the same time it was denying Mr. Siebert relief, the Court of Criminal Appeals continued to assess the merits of petitions filed well beyond the two-year statute of limitations period. *See Callahan v. State*, 767 So. 2d 380 (Ala. Crim. App. 1999), and *Jones v. State*, 753 So. 2d 1174 (Ala. Crim. App. 1999). As the Eleventh Circuit noted in *Siebert I*, 334 F.3d at 1026, the Court of Criminal Appeals’ statement in *Williams* declaring that “[a]ny previous holdings to the contrary are hereby expressly overruled,” 783 So. 2d at 137, also indicates that prior opinions were contrary to a view of Alabama’s statute of limitations as an absolute bar to state post-conviction petitions. Alabama’s statute of limitations before *Williams*, then, was treated sometimes as a waivable defense and sometimes as within the court’s discretion to apply or not. There was no consistency.

In its brief to the Eleventh Circuit, the State conceded that Alabama’s Rule 32.2(c) statute of limitations was not consistently applied at the time Mr. Siebert’s petition was pending in state court, Brief for Appellee, *Siebert II*, at 26-27 (“The trick in *Siebert I*—and the source of Siebert’s current confusion—was that it was *tough to tell* whether, in the years preceding *Williams v. State*, 783 So. 2d 137 [sic, 135] (Ala. Crim. App. 2000), whether [sic] Rule 32.2(c) was, in fact, jurisdictional . . . or discretionary”) (emphasis added), but insisted that this inconsistency is

protected by *Pace*, because of that decision's "categorical" language, Brief for Appellee, *Siebert II*, 8-9, 10, 14-15, 20-21. The State continues to assert the "categorical" character of this Court's holding in *Pace*. Pet. at 13-15.

The District Court was correct that the "properly filed" inquiry and the procedural default of claims inquiry are separate and distinct.¹¹ App. at 59a. Making that distinction, however, does not answer the question whether the "firmly established and regularly followed" standard applies to statutes of limitations. Nor does *Pace*. In *Pace*, this Court held that "time limits, *no matter their form*, are 'filing' conditions." 544 U.S. at 417 (emphasis added). This Court did not say, "no matter their *application*, whether consistent or inconsistent," they must be deferred to by federal courts in federal habeas review.

Only those state procedural rules which are "firmly established and regularly followed" merit deference from federal courts. *Siebert I*, 334 F.3d at 1025, citing *Edwards v. Carpenter*, 529 U.S. 446, 450 (2000); *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). Both the Eleventh Circuit, see *Wade v. Battle*, 379 F.3d 1254, 1264 (11th Cir. 2004), and the Sixth Circuit, see, e.g., *Hutchison v. Bell*, 303 F.3d 720, 735 (6th Cir. 2002); *Bird v. Hurst*, 110 Fed. Appx. 474, 478 (6th Cir. 2004) (unpub. op.), have applied this standard to statutes of limitations. See also *Peterson v. Brennan*, 2004 WL 1505253 at *7, n. 10 (E.D. Pa. July 15, 2004) (slip op.). Statutes of limitations are rules of procedure governing the processing of a case through the judicial

¹¹The District Court cited *Hurth v. Mitchem*, 400 F.3d 857, 862 (11th Cir. 2005), as support for this distinction. Because the District Court did not address further holdings of *Hurth* concerning Alabama's statute of limitations within the context of procedural default or arrive at the issue of whether Mr. Siebert's *claims* are defaulted, that issue was not before the Eleventh Circuit on appeal. Mr. Siebert contends that *Hurth* is based on a deduction that does not follow from *Siebert I* (that Alabama's statute of limitations was not firmly established and regularly followed only as a jurisdictional rule, but was as a nonjurisdictional rule) and on facts derived from inapposite caselaw.

system.¹² (For example, Alabama's post-conviction statute of limitations is set forth in Rule 32.2(c) of the Alabama Rules of Criminal Procedure.) Such rules, including statutes of limitations, must be consistently applied to avoid violating due process requirements under the federal Constitution. *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604 (1990) (Brennan, J., concurring in the judgment) ("The critical insight of *Shaffer* [*v. Heitner*, 433 U.S. 18 (1977)] is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process"). To hold otherwise would mean that state courts could accept some untimely petitions and deny others at whim and that such capricious decisions would be accorded full deference by federal courts. That cannot be this Court's intention. The concern of this Court in *Pace* was to defer to the states' right to devise their own rules for filing in order to maintain comity between state courts and federal courts. Federal courts owe no deference, however, to state statutes or rules of procedure which violate constitutional principles; rather, they have a duty to overrule them. *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice").

The problem with Alabama's statute of limitations at the time of Mr. Siebert's state post-

¹²At least one other circuit, post-*Pace*, has declined to read that opinion as barring all inquiry into state court decisions regarding timeliness. The Seventh Circuit recently applied the "adequate and independent state grounds" analysis to a state court's ruling on a petitioner's failure to meet a statute of limitations in *Smith v. Battaglia*, 415 F.3d 649, 653 (7th Cir. July 13, 2005). That court found that the petitioner's federal statute of limitations was tolled during the pendency of his state post-conviction petition because the state appellate court's dismissal addressed the merits of the claims and made only an ambiguous reference to the possibility that petitioner did not comply with the state statute of limitations.

conviction suit was not that explicit, statutorily established exceptions required some degree of merits review, as in *Pace*, but that the character of the statute of limitations itself was in question. The Eleventh Circuit, in *Siebert I*, determined that this inconsistency, affecting both form and application, made Alabama's statute of limitations unworthy of the deference otherwise due a state rule by a federal court. Because this Court, in *Pace*, reviewed a jurisdictional statute of limitations against which no challenge of inconsistency had been raised, the holding that "[w]hen a post-conviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)," 544 U.S. at 414, is inapplicable to this case and not contrary to the Eleventh Circuit's decision in *Siebert I* and its affirmance of *Siebert I* in *Siebert II*.

3. This Court's citation of Alabama's Rule 32 in footnote 7 of *Pace* does not answer whether the "firmly established and regularly followed" standard applies to post-conviction statutes of limitations.

Contrary to the State's assertion, *see* Pet. at 15-17, this Court's citation of Alabama's Rule 32.2(c) in footnote 7 in *Pace* does not stamp Alabama's statute of limitations with a seal of approval barring any examination of its application. 544 U.S. at 417, n.7. All footnote 7 does is distinguish between the *form* of time bars such as statutes of limitations and procedural bars respecting individual claims. *See id.* Alabama's Rule 32.2(c) time bar, *on its face*, appears to be an absolute bar to any court's consideration of an untimely petition, but in practice Alabama courts themselves did not so interpret the rule at the time Mr. Siebert's petition was in state court. *See Howard v. State*, 616 So. 2d 398 (Ala. Crim. App. 1993); *Jackson v. State*, 612 So. 2d 1356 (Ala. Crim. App. 1992); *see also Callahan v. State*, 767 So. 2d 380 (Ala. Crim. App. 1999); *Jones v. State*, 753 So. 2d 1174 (Ala. Crim. App. 1999). This Court, in *Pace*, noticed Rule 32.2(c) only as an example of one *form* in which a statute of limitations may appear; that notice

carries no further significance and does not address, much less answer, the question presented to this Court on appeal of *Siebert II*.

Furthermore, in its amicus brief to this Court in *Pace*, the State of Alabama represented that Alabama's post-conviction statute of limitations is jurisdictional and explicitly equated it to Pennsylvania's: "the Pennsylvania Legislature placed the post-conviction statute of limitation *not* in the 'Eligibility for Relief' section alongside the laches and successive-petition provisions, *see* 42 Pa. Cons. Stat. § 9543, but, instead, in a separate section titled 'Jurisdiction and Proceedings,' *id.* § 9545. Alabama utilized restrictive language to achieve precisely the same result." Brief for the State of Alabama et al. as Amici Curiae Supporting Respondent, *Pace*, (No. 03-9627) 2005 WL 154150 (emphasis in original). Alabama's statute of limitations is not a legislatively-enacted statute, but a court rule, *see Ex parte Ward*, – So. 2d –, 2007-WL 1576054, at *6, and Alabama's Supreme Court has now disavowed any jurisdictional character for that rule, *id.* Any significance that might have been accorded to the side-by-side placement of Pennsylvania's legislatively-enacted, jurisdictional statute of limitations and Alabama's court-made, affirmative defense statute of limitations in footnote 7 is undercut by the *Ex parte Ward* decision, post-dating *Pace*.

4. **Even if *Siebert II* were to be read as distinguishing affirmative defense statutes of limitations from jurisdictional and, therefore, not encompassed by *Pace*, such a distinction is supportable.**

Where a statute of limitations is jurisdictional, a petition filed beyond its limit is untimely when filed and remains untimely. A jurisdictional matter can be raised at any time, even on appeal. *Lanier v. State*, 733 So. 2d 931, 935 (Ala. Crim. App. 1998). Such a requirement is reasonably described as a "condition of filing," a rule which "go[es] to the very initiation of a

petition and a court's ability to consider that petition." *Pace*, 544 U.S. at 517. However, where a state applies its statute of limitations as an affirmative defense, a petition, even though filed beyond the limit, would be timely for tolling purposes if the state never raises the defense. Thus, its "proper filing" depends, not on compliance with the rules governing filing, but with an unpredictable, and subsequent, circumstance. Given these differences in applicability, distinguishing between jurisdictional statutes of limitations as filing conditions and affirmative defense statutes of limitations as conditions to obtaining relief makes sense. An affirmative defense statute of limitations depends, for its effectiveness, on being raised at the appropriate time, as with other rules governing procedural default. It does not operate as a bar on a court's ability to hear the case.

States have the right to establish their own procedures for processing post-conviction petitions, as long as they comply with constitutional requirements of due process, and federal courts can have no interest in creating a "filing" requirement which a state has not itself chosen to implement. Nor can federal courts have any interest in interpreting a state's procedural rules governing post-conviction petitions more stringently than does the state itself. Alabama's post-conviction statute of limitations has now been explicitly declared an affirmative *defense*. *Ex parte Ward*, – So. 2d –, 2007-WL 1576054 at *7. A defense is not and never has been a "condition of filing."

5. Mr. Siebert has not waived the issue of equitable tolling.

Mr. Siebert did raise the issue of equitable tolling in his initial brief to Eleventh Circuit in the prayer for relief. Brief of Appellant, *Siebert II*, at 21. *Cf. Pet.* at 6 n. 6; 12 n. 11. There he asked for remand for the District Court to consider the issue, which it had not revisited on first

remand. Brief of Appellant, *Siebert II*, at 21. Mr. Siebert never himself received notice of the issuance of a certificate of judgment. Furthermore, state law was confused about when direct appeal concluded and the statute of limitations began to run. See discussion above under Statement of the Case, Section A. Additionally, the confusion in Alabama's law about the operation of its post-conviction statute of limitations, and its inconsistent application, argues for tolling the federal limitations period for this first habeas petition in a capital case.

6. The State seeks to foreclose federal review of state court findings concerning timeliness in the wake of a decision of the Alabama Supreme Court that Alabama's post-conviction statute of limitations has been applied in a manner inconsistent with the state constitution.

The State has never argued below that Alabama's post-conviction statute of limitations is an affirmative defense. Since the filing of its Amended Answer in the state post-conviction trial court in 1995, the State has maintained that Rule 32's statute of limitations is jurisdictional. *See, e.g.,* State's Amended Answer and Motion to Dismiss, Tab #R-40 at 539-40; State's Brief on Appeal to the Alabama Court of Criminal Appeals, Tab #R-44 at 19-20; Respondent's Answer to Siebert's Petition for Writ of Habeas Corpus, *Siebert v. Haley*, No. 1:01-CV-02323-IPJ-TMP (N.D. Ala. filed Sept. 14, 2001) (Doc. # 8 at 3, 5, 7, 9, 11, 13, 14, 16, 18, 20, 22, 24, 26, 27, 29, 32, 33). Thus, the State's new-found advocacy of affirmative defense statutes of limitations has little or nothing to do with Mr. Siebert's case now on appeal before this Court.

A few months after the Eleventh Circuit decided *Siebert II*, the Alabama Supreme Court issued its first pronouncement respecting the character of Alabama's post-conviction statute of limitations, twenty years after its adoption.¹³ In *Ex parte Ward*, — So. 2d —, 2007 WL 15760054

¹³Temporary Rule 20, the predecessor to Rule 32, first imposed a statute of limitations in post-conviction proceedings in Alabama starting from its effective April 1, 1987.

(Ala. June 1, 2007), *cited at* Pet. at 7 n.7, the Alabama Supreme Court agreed with the petitioner in that case that Rule 32's statute of limitations, as a court rule and not a legislatively enacted statute, could not be jurisdictional under Alabama's Constitution and, therefore, will be applied henceforth as an affirmative defense.

Since its decision in *Williams* in 2000, the Alabama Court of Criminal Appeals has applied Alabama's post-conviction statute of limitations as a jurisdictional bar. Were this Court to grant certiorari on the State's question presented and agree with the State that *Pace* allows no federal review of state court timeliness rulings "whatever the circumstances," *see* Pet. at 12, federal courts in Alabama and the Eleventh Circuit will be bound to defer to timeliness rulings which Alabama's highest court has now declared unconstitutional under the laws of that state. Such an outcome would indeed transform the "considerations of comity and federalism" undergirding federal deference to state rulings on timeliness into "an arid ritual of meaningless form." *Lee v. Kemna*, 534 U.S. 362, 385-86 (2002) (citation omitted).

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Mr. Siebert requests that this Court deny certiorari and remand this case to the Eleventh Circuit for further proceedings.

Dated this 17th day of September 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of September 2007 served a copy of the foregoing Brief in Opposition in paper format by placing a copy of the same in the United States mail, first-class postage prepaid and properly addressed to the following the State's counsel:

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