No. 06-1680

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

REPLY BRIEF FOR PETITIONER

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September 28, 2007

QUESTION PRESENTED

(Capital Case)

In *Pace v. DiGuglielmo*, this Court held that "a state postconviction petition rejected by the state court as untimely" is, by definition, not "properly filed" for AEDPA tolling purposes. 544 U.S. 408, 410 (2005). In a 1-page precedential opinion, the Eleventh Circuit ruled below, without any analysis, that the holding in *Pace* simply does not apply where the pertinent state statute of limitations "operate[s] as an affirmative defense" rather than as a jurisdictional barrier to suit – even where, as here, the time bar is both invoked and enforced. The question presented is whether the Eleventh Circuit's decision should be reversed because it impermissibly ignores the plain language of this Court's opinion in *Pace* and frustrates AEDPA's statutory purposes.

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If there is any truth to the adage that the best way to get a meritorious cert petition denied is to confuse the issues and muddy the waters, Siebert's brief in opposition is a tour de force. It is a study in misdirection. The problem for Siebert, however, is that the issue presented here – which he does not even remotely join – is simple and straightforward. Exceedingly so, in fact. In *Pace v. DiGuglielmo*, this Court held, in the clearest terms imaginable, that "a state postconviction petition rejected by the state court as untimely" is, by definition, not "properly filed" for AEDPA tolling purposes. 544 U.S. 408, 410 (2005). In the decision below, the Eleventh Circuit held, in equally clear terms, that the rule of *Pace* simply does not apply where the underlying state post-conviction "statute of limitations … operate[s] as an affirmative defense" rather than as a jurisdictional barrier to suit. App. 1a. The question here is whether the exception that the Eleventh Circuit has decreed – *i.e.*, for non-jurisdictional, defensive time-bars – is consistent with *Pace*. It is not.

This Court should grant the petition and summarily reverse or, alternatively, grant the petition and set the case for briefing and argument. Siebert has given this Court no reason not to do so.

I. Siebert Offers Virtually No Response To The Arguments Contained In The Petition.

Tellingly, Siebert has almost nothing to say about the arguments actually presented in the petition. ***First***, he offers no response to the State's contention that the categorical language of *Pace* controls the question presented here. As the State emphasized in the petition (Pet. 13-14, 19), *Pace* (1) reiterates that "time limits on postconviction petitions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed'"; (2) holds that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)"; and (3) concludes that where "the state court reject[s a] petitioner's [post-conviction] petition as untimely, it [is] not 'properly filed,' and he is not entitled to statutory tolling under

§ 2244(d)(2)." 544 U.S. at 413, 414, 417. Siebert provides absolutely no explanation how *Pace* can reasonably be read (as the Eleventh Circuit has read it) to carve out an exception for defensive time bars. And with good reason: There is none. This Court's opinion in *Pace* is clear as a bell; the Eleventh Circuit either fundamentally misunderstood it or purposefully subverted it.[1]

Second, Siebert offers no response to the State's observation (Pet. 19-20) that in *Pace*'s predecessor, *Artuz v. Bennett*, this Court listed as "proper[] fil[ing]" requirements, in addition to (1) "time limits upon [a petition's] delivery," (2) the "form of the document," (3) the "court and office in which it must be lodged," and (4) the "requisite filing fee." 531 U.S. 4, 8 (2000). Because, the State pointed out, "*[n]one* of those requirements is 'jurisdictional in the sense that the court lacks power to deal with the matter,'" Pet. 20 (quoting App. 61a), it simply cannot be, as the Eleventh Circuit held here, that only jurisdictional rules can be "proper[] fil[ing]" requirements and, therefore, that because Rule 32.2(c)'s time

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[1] Siebert's only response to *Pace* itself is to this Court's specific citation of Alabama's Rule 32.2(c) as a "proper[] fil[ing]" requirement. *See* Pet. 15-17. Siebert attempts to zing the State of Alabama for having "represented" in its amicus brief in *Pace* that Rule 32.2(c) was a jurisdictional requirement. Br. in Opp. 19. The zinger misses the mark, however, and, in fact, serves to underscore the point we are making here about *Pace*'s general applicability. At the time Alabama filed its brief in *Pace* in January 2005, the intermediate court of criminal appeals had held that Rule 32.2(c)'s time bar *was* jurisdictional. *See Williams v. State*, 783 So. 2d 135, 137 (Ala. Crim. App. 2000). As pointed out in the petition, however (Pet. 7 n.7), the Alabama Supreme Court recently clarified, to the contrary, that Rule 32.2(c) is defensive in nature. *See Ex parte Ward*, __ So. 2d __, 2007 WL 1576054, at *7 (Ala. June 1, 2007). In any event, the point – to which Siebert has not responded – is that given Pennsylvania's and Alabama's emphasis on the (then) jurisdictional characters of the limitations provisions at issue in *Pace*, this Court "had every opportunity to limit the scope of its holding to technically jurisdictional state time bars." Pet. 19 n.14. Instead, this Court "generalized its holding, in the interest of establishing an unambiguous rule, to include all state-court determinations of untimeliness." Pet. 19.

bar "operated as an affirmative defense" (App. 1a) it cannot be a filing condition. Pet. 20. Again, no rebuttal from Siebert.

Third, Siebert offers no response to the State's contention that "the Eleventh Circuit's holding undermines the purposes that animate AEDPA's limitations and tolling provisions." Pet. 20. As the State pointed out in the petition, under the Eleventh Circuit's rule, any inmate in any jurisdiction with a defensive time bar may, in direct contravention of *Pace*, *see* 544 U.S. at 413, "unilaterally extend the time for filing his federal habeas petition simply by lodging an untimely state petition." Pet. 21. Once again, Siebert has nothing to say in reply.

Fourth, Siebert offers no response to the State's argument that "the Eleventh Circuit's holding defies common sense." Pet. 21-22. He never provides any explanation of why, in the real world, "a state time bar's formal character as either a jurisdictional barrier or an affirmative defense should matter one whit to the statutory 'proper[] fil[ing]' criterion." Pet. 22. The reason is that there simply is no good reason to treat jurisdictional and defensive statutes differently – particularly where, as here, the time bar is both invoked and enforced.[2]

Finally, Siebert offers no response to the State's contention that "the Eleventh Circuit's decision implicates a question of national importance." Pet. 23-30. Nor could he. As is amply demonstrated by the amicus curiae brief filed by Illinois and 18 other States in support of Alabama's petition,

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[2] Siebert's only argument in this connection is to say that "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*." Br. in Opp. 20 (emphasis added). The simple, and dispositive, answer is that in *this* case (1) the State invoked the time bar and (2) the state courts (a) explicitly rejected any suggestion that the State had waived the bar and (b) enforced the bar by dismissing Siebert's Rule 32 petition as untimely. *See* Pet. 22 & n.15.

this is a case whose significance radiates well beyond the parties to this litigation. The reason, as we have explained – and as Siebert has made no effort to deny – is that the logic of the Eleventh Circuit's decision "leaves a whole host of States right back where they started before this Court decided *Pace*." Pet. 23.[3]

II. Siebert's Efforts To Deflect Attention From The Question Presented – And Ultimately To Confuse The Court – Are Both Unpersuasive And Deceitful.

Rather than join issue on the question that this case presents – whether there is any basis for reading *Pace* to exclude non-jurisdictional, defensive time bars – Siebert makes two "moves" (both of which the State anticipated, *see* Pet. 6 n.6, 17-18 n.12) in an attempt to suggest that, in fact, the case may not present that question at all. Neither move is availing and, as we will explain, both rest on what can only be understood as a conscious effort to mislead the Court.

A. The "Firmly Established And Regularly Followed" Rule Is Not At Issue Here.

The principal theme of Siebert's brief in opposition, such as it is, is that the Eleventh Circuit did not refuse to apply *Pace* because Rule 32.2(c)'s statute of limitations is defensive rather than jurisdictional but, instead, refused to apply

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[3] Siebert's suggestion (Br. in Opp. 21-22) that the Alabama Supreme Court's recent decision in *Ex parte Ward*, __ So. 2d __, 2007 WL 1576054, somehow diminishes the practical significance of this case is baseless. Clearly, the question whether *Pace* governs the tolling question where the underlying state time bar "operate[s] as an affirmative defense" (App. 1a) controls Siebert's own case. By confirming that Alabama's Rule 32.2(c) "is an affirmative defense and not a jurisdictional bar," *Ward*, __ So. 2d __, __, 2007 WL 1576054, at *7, *Ward* makes clear that the same question will be dispositive in Alabama on a going-forward basis. And, as already noted, the Eleventh Circuit's decision here is practically important enough to trigger an amicus brief by 19 additional States, 18 of which lie outside the Eleventh Circuit's jurisdictional boundaries.

Pace because Rule 32.2(c)'s statute of limitations was not "firmly established and regularly followed" (or "FERF") at the time Siebert filed his post-conviction petition. Siebert's argument in that respect – which begins with his restatement of the question presented (Br. in Opp. i) and continues throughout the entirety of his brief (*e.g.*, Br. in Opp. 1, 8-18, 21) – is quite wrong. Worse than wrong, Siebert's argument – and we do not say so lightly – can only be understood as a deliberate attempt to mislead the Court.

1. That Siebert's argument is wrong – and his effort to recharacterize the decision under review, unpersuasive – is clear from the face of the Eleventh Circuit's own opinion. The Eleventh Circuit here refused to "revisit[its] opinion in *Siebert I* in light of *Pace*" for one reason and one reason only: because it believed that "*Pace* did not address the question presented in *Siebert I, to wit: a statute of limitations that operated as an affirmative defense*." App. 1a (emphasis added). The Eleventh Circuit conspicuously did *not* say that "*Pace* did not address the question presented in *Siebert I*, to wit: a statute of limitations that was not 'firmly established and regularly followed' at the time the state post-conviction petition was filed." So, again, as we have said (and as Siebert has made no effort to dispute), "the court of appeals made nothing of the consistent-application issue" and, in fact, "it is clear from its opinion that the Eleventh Circuit would refuse to apply *Pace* to any statute of limitations that 'operate[s] as an affirmative defense,' no matter how uniformly applied." Pet. 18 n.12.[4]

[4]Accordingly, Siebert's labored effort (*e.g.*, Br. in Opp. 8-12) to recharacterize as a pure FERF case the *Siebert I* decision filed by Judges Barkett, Wilson, and Tjoflat – a decision that, we admit, is no portrait of precision – runs headlong into *Siebert II*, in which *the very same Judges Barkett, Wilson, and Tjoflat* make clear that the "question presented in *Siebert I*" was "a statute of limitations that operated as an affirmative defense." App. 1a.

2. There is, as it turns out, a very good reason that the *Siebert II* panel did not distinguish *Pace* (and rule for Siebert) on the ground that Alabama's Rule 32.2(c) was not FERF at the time Siebert filed his post-conviction petition. The reason, as we explained in the petition (Pet. 17-18 n.12), is that only nine months before it issued the decision under review, the same Eleventh Circuit panel – Judges Barkett, Wilson, and Tjoflat – held, in a parallel case involving Siebert himself, that Rule 32.2(c) ***was*** FERF at the time Siebert filed. *See Siebert v. Allen*, 455 F.3d 1269, 1271-72 (11th Cir. 2006) (following *Hurth v. Mitchem*, 400 F.3d 857, 863 (11th Cir. 2005), which "explicitly held that Alabama's Rule 32 was sufficiently firmly established and regularly followed to warrant a procedural default"), *cert. denied*, 127 S. Ct. 1823 (2007).

Given the overriding emphasis that Siebert places on the FERF rule in his brief in opposition, his failure to breathe there even a word of the Eleventh Circuit's decision in his parallel case – which, so as to avoid confusion with *Siebert I* and *II*, we'll call *Siebert A*[5] – is deceptive in the extreme. We don't say so lightly, but there is simply no other explanation. Siebert's current counsel certainly can't plead ignorance of *Siebert A* – they litigated it. Two of Siebert's current attorneys briefed that case in the Eleventh Circuit, and one of them presented the oral argument there. The whole point of Siebert's argument in *Siebert A*, of course, was that "the state law ground applied in Mr. Siebert's case" – *i.e.*, the Rule 32.2(c) time bar – "was not firmly established and regularly followed." Br. of Appellant, *Siebert v. Campbell* at 9-

[5] Recall that Siebert filed two separate habeas petitions in two different federal district courts challenging two distinct convictions. *Siebert I* dealt with both petitions together. On remand from *Siebert I*, the two cases were decoupled. *Siebert II*, the decision under review here, arises out of the conviction for the murder of Linda Jarman. What we are calling *Siebert A* arises out of the convictions for the murders of Sherri Weathers and her two young sons. *See* Pet. 3, 5 & n.5.

14, No. 05-16646-P (Jan. 9, 2006). But as we have explained, the Eleventh Circuit decided that question – squarely – against Siebert, holding that Rule 32.2(c) "was sufficiently firmly established and regularly followed to warrant a procedural default." *Siebert A*, 455 F.3d at 1271. Then, having lost on the FERF issue in the Eleventh Circuit, Siebert's lawyers – the same two – filed a cert petition in this Court challenging the Eleventh Circuit's decision. In that petition, they contended – as they do in their opposition here and, indeed, citing the very same state court cases – that Rule 32.2(c) was not FERF and that the Eleventh Circuit had erred in concluding otherwise. *See, e.g.*, Pet. for Writ of Certiorari at 4, *Siebert v. Allen*, No. 06-8808 (Jan. 2, 2007) ("Alabama's courts, at the time that Mr. Siebert's state postconviction petition was filed, did not apply it consistently to petitioners in his position."); *id*. at 6 ("The rule Alabama applied to Mr. Siebert, that the State may raise an untimeliness defense at any time, was novel and was not firmly established at the time of his sate postconviction filing."). This Court denied the petition. *See Siebert v. Allen*, 127 S. Ct. 1823 (2007).

The point is simply that the Eleventh Circuit's decision in the current case, *Siebert II*, did *not* turn on a determination that Rule 32.2(c) was not FERF – and Siebert's lawyers know perfectly well it didn't. Not only does the face of the *Siebert II* opinion itself make clear that it turns, instead, on a determination that *Pace* doesn't apply to time bars that "operate[] as an affirmative defense" (App. 1a), but also, nine months before they decided *Siebert II*, the same three Eleventh Circuit judges had definitively decided in *Siebert A* that Rule 32.2(c) *was* FERF at the time Siebert filed his state post-conviction petition.

Siebert's lawyers are intimately familiar with the history of these cases. Their suggestion that *Siebert II* is about anything other than *Pace*'s application to defensive (as opposed to jurisdictional) time bars – and their failure to come clean concerning *Siebert A* – can only be understood as a conscious

effort to mislead the Court. That effort should not be rewarded.[6]

B. Siebert's Equitable-Tolling Argument Is Both Waived And Meritless.

In a second effort to cloud the sole issue presented, Siebert asserts in his opposition that even if *Pace* controls the statutory-tolling question here, he is nonetheless entitled to equitable tolling. There are two problems: waiver and baselessness.

1. For starters, Siebert says that he "has not waived the issue of equitable tolling." Br. in Opp. 20-21. He is wrong, as a brief history will conclusively demonstrate. As Siebert explains, "[t]he State raised the issue of equitable tolling in its [original, September 2001] Motion to Dismiss" in *Siebert I*. Br. in Opp. 7 n.7. Although Siebert did "not specifically argue that his petition should not be viewed as time-barred based on the doctrine of equitable tolling" (App. 14a), the district court gave him the benefit of the doubt and considered the equitable-tolling issue on the merits (App. 14a-16a). Having reviewed the circumstances of Siebert's case, the district court held that "the statute of limitation [wa]s not due to be equitably tolled." App. 16a. Siebert did not contest – nor does he even claim here to have contested – that adverse determination on appeal to the Eleventh Circuit in *Siebert I*; the phrase "equitable tolling" appears nowhere in Siebert's briefs to that court. The equitable-tolling issue was thus irrevocably waived at that point. *See United States v. Levy*, 416 F.3d 1273, 1275 (11th Cir. 2005) (holding that arguments not raised in appellant's opening brief are waived).

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[6] Even if *Siebert II* could be recharacterized as a FERF case – which, in view of its own plain language and the intervening decision in *Siebert A*, it can't be – the Eleventh Circuit's importation of the FERF rule into the § 2244(d)(2) "proper[] fil[ing]" analysis would be irreconcilable with *Carey v. Saffold*, 536 U.S. 214 (2002). *See* CJLF Br. 7-8.

When on remand in what became *Siebert II* the State again moved to dismiss on *Pace* grounds, Siebert defended against *Pace* but did not seek (nor does he now even claim to have sought) equitable tolling. In fact, the *only* place that Siebert now claims to have mentioned equitable tolling throughout the entire 6+ year history of this habeas litigation is in a single sentence of the "prayer for relief" (*i.e.*, the concluding paragraph) in his opening brief to the Eleventh Circuit in *Siebert II*. That sentence, in full, reads as follows: "Because this is a death penalty case, should this Court rule adversely to Mr. Siebert, it should still remand to the District Court for consideration of the appropriateness of equitable tolling." Br. of Appellant at 21, *Siebert v. Allen*, No. 06-11841-P (May 2, 2006). That passing reference was too little, too late. It was too late, of course, because the equitable-tolling issue had already been irrevocably waived by virtue of Siebert's failure – which he acknowledges here – to present the issue to the Eleventh Circuit in *Siebert I*. It was too little because under the controlling law "a passing reference in an appellate brief is insufficient to raise an issue." *Chavis v. Clayton County Sch. Dist.*, 300 F.3d 1288, 1291 n.4 (11th Cir. 2002); *accord Draper v. Reynolds*, 369 F.3d 1270, 1277 n.12 (11th Cir. 2004) (holding that where a "brief on appeal fails to argue the merits" of a claim, that claim is "waived"). Accordingly, there can be no meaningful dispute here that the equitable-tolling argument is indeed waived.

2. The equitable-tolling argument is meritless, in any event. Siebert bases his claim to equitable tolling on his assertion that he "never received a copy or notice of the certificate of judgment issued by the Alabama Court of Criminal Appeals," issuance of which started the clock on his Rule 32 petition. Br. in Opp. 7-8; *see id*. at 21 ("Mr. Siebert never himself received notice of the issuance of a certificate of judgment."). The problem is, that issue, like the FERF issue, has already been finally decided against Siebert – indeed, in the same *Siebert A* litigation that Siebert's lawyers have so studiously avoided mentioning. There, the Eleventh Circuit addressed the identical contention that Siebert "did not per-

sonally receive notice of the time that his state postconviction limitations period began to run" – asserted there as "cause" for a procedural default – and flatly rejected it: "Siebert, who was represented by counsel, does not present any evidence that his counsel did not receive the certificate of judgment or that the clerk of court failed to comply with the Alabama Rules of Appellate Procedure," which requires service of all court orders on attorneys of represented parties. 455 F.3d at 1272-73. This Court, as noted, denied certiorari. 127 S. Ct. 1823.

Siebert's failure to apprise this Court of *Siebert A* is, therefore, doubly dishonest. Not only does that case completely unravel Siebert's effort to recharacterize the decision below as turning on the FERF rule (*see supra* at 4-7), it also pulls the string on Siebert's attempt to revive the equitable-tolling issue.

CONCLUSION

This Court should grant the petition and summarily reverse or, alternatively, grant the petition and set the case for briefing and argument.

Respectfully submitted,

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