No. __-

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

PETITION FOR A WRIT OF CERTIORARI

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June 15, 2007

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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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The June 23, 2003 decision of the Eleventh Circuit vacating the district court's limitations-based dismissal is reported at *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003), and is reproduced at App. 25a-48a.

The February 9, 2006 decision of the United States District Court for the Northern District of Alabama again dismissing Siebert's federal habeas corpus petition as untimely is not reported. It is reproduced at App. 49a-66a.

The March 7, 2007 decision of the Eleventh Circuit again vacating the district court's limitations-based dismissal is reported at *Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007), and is reproduced at App. 1a.

The April 30, 2007 order of the Eleventh Circuit denying the State's petition for rehearing en banc is not reported. It is reproduced at App. 67a.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered the decision that is the subject of this petition for certiorari on March 7, 2007. *See* App. 1a. The Eleventh Circuit denied the State's timely petition for rehearing en banc on April 30, 2007. *See* App. 67a. This petition is timely because it is filed within 90 days of the order refusing en banc rehearing. *See* Sup. Ct. R. 13.3.

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 2244(d)(1) of Title 28 of the United States Code provides, in relevant part: "A 1-year period of

limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. §2244(d)(1).

2. Section 2244(d)(2) of Title 28 of the United States Code provides, in relevant part: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. §2244(d)(2).

INTRODUCTION

In the decision below, the Eleventh Circuit (Barkett, J., joined by Tjoflat and Wilson, JJ.)) held, in a summary – but precedential – opinion, that a state post-conviction petition that all agree was untimely filed (and, indeed, that was dismissed by the state courts specifically for having been untimely filed) was, despite its lateness, "properly filed" within the meaning of AEDPA's tolling provision, 28 U.S.C. §2244(d)(2). That holding is directly contrary to, and irreconcilable with, this Court's decisions in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and *Artuz v. Bennett*, 531 U.S. 4 (2000). Given the "obvious[ness]" of the Eleventh Circuit's error, this Court should grant the petition for certiorari and summarily reverse. *Gonzales v. Thomas*, 126 S. Ct. 1613, 1614 (2006). *See also, e.g., Horn v. Banks*, 536 U.S. 266, 267 (2002) (summary reversal appropriate where decision "directly contravene[s]" Supreme Court precedent); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (summary reversal appropriate where decision is "flatly contrary to this Court's controlling precedent").[1] Alternatively, and in view

[1] This Court has not hesitated to summarily reverse lower-court decisions misapplying the AEDPA-amended federal habeas statute. *See, e.g., Kane v. Garcia Espitia*, 546 U.S. 9 (2005); *Schriro v. Smith*, 546 U.S. 6 (2005); *Bell v. Cone*, 543 U.S. 447 (2005); *Holland v. Jackson*, 542 U.S. 934 (2004); *Middleton v. McNeil*, 541 U.S. 433 (2004); *Mitchell v. Esparza*, 540 U.S. 12 (2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003); *Woodford v. Visciotti*, 537 U.S. 19 (2002); *Early v. Packer*, 537 U.S. 3 (2002).

of the fact that the logic of the Eleventh Circuit's decision – which distinguishes jurisdictional from defensive time bars for *Pace* purposes – has the potential to foreclose *Pace*'s application in as many as half the States in the country, this Court should grant the petition and set the case for briefing and argument.

STATEMENT OF THE CASE

A. Facts and State-Court Proceedings

In 1987, Daniel Siebert was convicted of capital murder and sentenced to death for killing Linda Jarman, the "hearing-impaired friend and next door neighbor" of Sherri Weathers, whom (along with her two young sons) Siebert had also murdered. *Siebert v. State*, 778 So. 2d 842, 843 (Ala. Crim. App. 1999). Siebert's conviction and sentence pertaining to the Jarman murder were affirmed on direct appeal, *see Siebert v. State*, 562 So. 2d 586 (Ala. Crim. App. 1989), *aff'd, Ex parte Siebert*, 562 So. 2d 600 (Ala. 1990), *cert. denied, Siebert v. Alabama*, 498 U.S. 963 (1990), and the certificate of judgment issued on May 22, 1990, *see Siebert*, 778 So 2d at 846.

Siebert filed a post-conviction ("Rule 32") petition in state circuit court – but not until August 25, 1992, several months after the expiration of the then-applicable two-year statute of limitations, *see* Ala. R. Crim. P. 32.2(c), which runs from the issuance of the certificate of judgment. *Siebert*, 778 So. 2d at 846.[2] The State answered Siebert's Rule 32 petition and, at least initially, did not raise a timeliness objection. *Id.*

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[2] At the time, Rule 32.2(c) stated, in pertinent part, that "the court shall not entertain any petition" on specified grounds "unless the petition is filed ... within two (2) years after the issuance of the certificate of judgment by the Court of Criminal Appeals ...." Ala. R. Crim. P. 32.2(c). Effective August 1, 2002, the rule was amended to shorten the filing deadline to one year; otherwise, the text of the rule remained unchanged.

On the second day of the state-court evidentiary hearing, the State amended its answer and "requested for the first time that the petition[] be denied pursuant to Rule 32.2(c) because the two-year limitations period allowed for filing a Rule 32 petition had expired." *Id.* Siebert sought and received the circuit court's permission to respond to the State's timeliness argument. R32, Vol. 7, p. 148-52.[3] "Out of an abundance of caution, the circuit court continued to hear Siebert's arguments" on the merits. *Siebert*, 778 So. 2d at 846. In doing so, however, the circuit court made clear that it was not suggesting that the State had waived the Rule 32.2(c) time bar. R32, Vol. 7, pp. 151-52.

Siebert subsequently responded in writing to the State's invocation of Rule 32.2(c)'s statute of limitations. R32, Vol. 3, p. 552. As relevant for present purposes, Siebert contended that the State had "waived its affirmative defense" of untimeliness "by failing to raise it in its first responsive pleading." *Id.* at 554.[4]

In its written order, the circuit court expressly rejected Siebert's waiver argument and held that the State "did not waive the statute of limitations defense by failing to raise it in its first responsive pleading." R32, Vol. 5, p. 879. Accordingly, the circuit court dismissed Siebert's Rule 32 petition as being "untimely filed pursuant to Rule 32.2(c) of the Alabama Rules of Criminal Procedure." *Id.* at 878. "In the alternative," the court ruled that Siebert's claims were "without merit." *Id.* at 881.

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[3] "R32" refers to the record compiled for post-conviction Rule 32 proceedings in state court.

[4] Siebert also argued (1) that the Rule 32 statute of limitations commenced not with the issuance of the certificate of judgment on May 22, 1990, but, rather, with this Court's denial of certiorari on direct appeal on November 5, 1990, and (2) that his failure to file on time was the result of "excusable neglect." R32, Vol. 3, pp. 558-64. The state courts rejected those arguments, *see* R32, Vol. 5, pp. 880-81; *Siebert*, 778 So. 2d at 848-49, and they have no bearing on the issues currently before this Court.

The Alabama Court of Criminal Appeals affirmed exclusively on statute-of-limitations grounds. Its reasoning was straightforward: Because "the certificate of judgment ... was issued on May 22, 1990," "[p]ursuant to Rule 32.2(c), Siebert's petition, filed August 25, 1992, was untimely." 778 So. 2d at 847. The appellate court expressly refused to address the merits of Siebert's time-barred claims, *see id.* at 846, and, further, expressly rejected Siebert's various efforts to avoid Rule 32.2(c), including his assertion that the State had waived the limitations bar by not pleading it initially, *see id.* at 847 ("Claim 2, asserting that Rule 32.2(c) must be raised as an affirmative defense in the first responsive pleading or it is waived, is without merit."). The Alabama Supreme Court denied Siebert's petition for certiorari. *Ex parte Siebert*, 778 So. 2d 857 (Ala. 2000).

B. Federal-Court Proceedings

1. "*Siebert I*"

a. *District Court*. Siebert filed the federal habeas corpus petition that underlies this action in the United States District Court for the Northern District of Alabama on September 14, 2001. Doc. 1.[5] The State moved to dismiss the petition on the ground that it was time-barred under AEDPA's one-year statute of limitations, codified at 28 U.S.C. §2244(d)(1). The district court found that absent tolling, AEDPA's limitations period would have expired on April 23, 1997, at the conclusion of the one-year grace period applicable to petitioners whose convictions became final before the statute's enactment. App. 6a (citing *Wilcox v. Florida Dep't of Corr.*, 158 F.3d 1209 (11th Cir. 1998)). The timeliness of Siebert's federal habeas petition, therefore, depended entirely

[5] On the same date, Siebert filed a separate federal habeas petition pertaining to the Weathers murder convictions (*see supra* at 3) in the United States District Court for the Middle District of Alabama. The Eleventh Circuit recently concluded that the claims in that petition were procedurally defaulted, *Siebert v. Allen*, 455 F.3d 1269 (11th Cir. 2006), and this Court denied certiorari, *Siebert v. Allen*, 127 S. Ct. 1823 (2007).

on whether Siebert could avail himself of 28 U.S.C. §2244(d)(2), which tolls AEDPA's limitations period during the time in which a petitioner has a "properly filed" state post-conviction petition pending. App. 7a. With respect to that question, the district court observed that "the state courts [had] determined conclusively as a matter of state law that [Siebert's] Rule 32 petition was untimely at the time it was filed" and concluded that under the applicable law (including this Court's decision in *Artuz v. Bennett*, 531 U.S. 4 (2000)) an untimely state post-conviction petition is not "properly filed" within the meaning of §2244(d)(2) so as to toll AEDPA's one-year statute. App. 8a-12a, 13a. The district court found itself "compelled" to conclude that "the untimely state petition was not a 'properly filed application' capable of tolling the limitation period" and, therefore, "to dismiss [Siebert's] habeas petition as time-barred under §2244(d)(1)." App. 13a.[6]

b. *Eleventh Circuit*. An Eleventh Circuit panel (the same panel that issued the decision that is the subject of this petition) vacated the district court's limitations-based dismissal and remanded for further proceedings. App. 25a-48a (*Siebert v. Campbell*, 334 F.3d 1018, 1032 (11th Cir. 2003) ("*Siebert I*")). The court of appeals held that Siebert's federal habeas petition was timely because, the court said, AEDPA's one-year statute had been tolled during the pendency of Siebert's state Rule 32 petition. Even though Siebert's Rule 32 petition had itself been filed late – and, indeed, had been dismissed by the state courts specifically on lateness grounds – the Eleventh Circuit found that it had been "properly filed" within the meaning of §2244(d)(2). App.

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[6] The district court rejected any contention that equitable tolling applied. App. 14a-16a. Siebert never sought review of that determination, either in the Eleventh Circuit in *Siebert I*, on remand to the district court, or on return to the Eleventh Circuit in what we are calling *Siebert II* (*see infra* at 7-9). Equitable tolling, therefore, is no longer at issue in this case. *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).

47a. In so holding, the Eleventh Circuit started from the premise (which it sought to draw out of *Artuz*) that "[c]ompliance with a statute of limitations is not generally treated as a precondition to a suit's commencement, but rather as a condition that must be satisfied to win relief on a particular claim (or all claims)." App. 34a. In other words, the court of appeals determined, compliance with an applicable state statute of limitations is not – typically, anyway – a "proper[] fil[ing]" requirement as that term is used in §2244(d)(2). More specifically, the court held that because at the time Siebert filed his post-conviction petition Rule 32.2(c)'s time-bar was not jurisdictional, "timeliness was not a prerequisite to filing *per se*." App. 44a; *accord id.* at 36a (looking to Rule 32.2(c)'s "jurisdictional character"); *id.* at 37a ("jurisdictional character"); *id.* at 38a ("jurisdictional character"). Succinctly stated, *Siebert I* held "that in order for a state collateral petition in Alabama to have been 'properly filed' for §2244(d)(2) tolling purposes, it is not necessary for that petition to have met the state's own statute of limitations, unless that statute of limitations is jurisdictional in nature." *Hurth v. Mitchem*, 400 F.3d 857, 861 (11th Cir. 2005) (citing *Siebert I*, 334 F.3d at 1032).[7]

2. *"Siebert II"*

a. *District Court.* Following the Eleventh Circuit's remand to the district court, Siebert's federal habeas proceeding lay dormant for a period of months. Then, promptly on the heels of this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), which held, quite contrary to *Siebert I*, that an untimely state post-conviction petition is *not* "properly filed" for AEDPA tolling purposes, the State renewed its motion to dismiss. The State contended that *Pace* had effectively overruled and superseded *Siebert I*

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[7] The Alabama Supreme Court recently confirmed that "the limitations provision of Rule 32.2(c) is an affirmative defense and not a jurisdictional bar." *Ex parte Ward*, __ So. 2d __, __, 2007 WL 1576054, at *7 (Ala. June 1, 2007).

and urged the district court to dismiss Siebert's habeas petition as untimely under §2244(d). The district court did so.

The district court observed that in *Pace* this Court had held "that a post-conviction petition rejected by the state courts as untimely filed under state law is not considered 'properly filed' within the meaning of AEDPA's tolling provision." App. 55a. Specifically, the district court emphasized that this Court had "stated simply: '[W]e hold that time limits, *no matter their form*, are "filing" conditions.'" *Id.* (quoting *Pace*, 544 U.S. at 417). The district court also highlighted the *Pace* Court's unqualified statement "that, when the state courts hold that a post-conviction petition is untimely under state law, '"that is the end of the matter" for purposes of §2244(d)(2).'" App. 57a (quoting *Pace*, 544 U.S. at 414). Because, the district court held, the Alabama courts here "determined conclusively as a matter of state law that [Siebert's] Rule 32 petition was untimely at the time it was filed," the petition was not, under the plain language of *Pace*, "properly filed" for AEDPA tolling purposes. App. 59a.

The district court rejected any suggestion that Alabama's Rule 32.2(c) cannot be a "proper[] fil[ing]" condition because it is a defensive rather than a "jurisdictional" requirement. "Nothing in *Pace* or §2244(d)," the district court stressed, "says that only 'jurisdictional' rules constitute 'conditions to filing.'" App. 61a. By contrast, the district court observed, the *Pace* Court (1) spoke in categorical terms about *all* post-conviction time bars being "proper[] fil[ing]" requirements; (2) referenced other plainly non-jurisdictional rules (concerning, *e.g.*, forms and fees) as being filing conditions; and (3) actually pointed specifically to Alabama's Rule 32.2(c) as just the kind of rule it had in mind in holding that time bars are filing conditions. App. 61a-62a.

b. *Eleventh Circuit.* Which brings us to the decision now under review – *Siebert II.* In a 1-page summary (but published and precedential) opinion, the same Eleventh

Circuit panel that had reversed in *Siebert I* reversed yet again. App. 1a (*Siebert v. Allen*, 480 F.3d 1089 (11th Cir. 2007) ("*Siebert II*")). In so doing, it decided an issue of exceptional importance with little more than a wave of the hand. After restating its earlier holding in *Siebert I* that, despite its acknowledged (and adjudicated) untimeliness, Siebert's Rule 32 petition had been "properly filed" within the meaning of §2244(d)(2) "so that his one year federal statute of limitations was tolled, making his federal petition timely," the Eleventh Circuit observed that, on remand, the district court had concluded that this Court's intervening decision in *Pace* had "superseded" and effectively overruled *Siebert I*. *Id.* The Eleventh Circuit, however, refused to "revisit[its] opinion in *Siebert I* in light of *Pace*." *Id.* Instead, in a single stroke, and without a shred of analysis or explanation, the court of appeals announced its holding as follows: "We find that the law of the case applies, noting that *Pace* did not address the question presented in *Siebert I*, to wit: a statute of limitations that operated as an affirmative defense." *Id.* In other words, the Eleventh Circuit held that the rule of *Pace* – that an untimely state post-conviction petition is, by definition, not "properly filed" for AEDPA tolling purposes – applies *only* where the pertinent state time bar is jurisdictional, rather than defensive, in nature.[8]

The Eleventh Circuit's decision is indefensible. It should be reversed.

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[8] The court of appeals remanded Siebert's federal habeas petition to the district court for procedural-bar and merits determinations – determinations that necessarily presume the timeliness of the petition itself. App. 1a. The Eleventh Circuit's remand is "no impediment to certiorari" because "the opinion of the court below has decided an important issue, otherwise worthy of review, and [this Court's] intervention may serve to hasten or finally resolve the litigation." R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* §4.18, at 260 (8th ed. 2002) (collecting cases).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari (and either summarily reverse or set the case for briefing and argument) because the Eleventh Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, in the pages that follow, we will demonstrate (1) that this Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), clearly supersedes *Siebert I*; (2) that the Eleventh Circuit's effort in *Siebert II* to deny *Pace*'s application to non-jurisdictional, defensive time bars flouts *Pace*'s plain language, AEDPA's underlying purposes, and common sense; and (3) that the Eleventh Circuit's strained reading of *Pace* implicates a question of national importance.

THE ELEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *PACE V. DIGUGLIELMO.*

Before jumping into the petition proper, there is one important preliminary point: The Eleventh Circuit's reference to the "law of the case" doctrine does not in any way shield its substantive determination concerning *Pace*'s applicability from this Court's review. The "law of the case" to which the court of appeals referred, of course, was *Siebert I*. But the very question presented here is whether, as the State has argued and the district court found, this Court's intervening decision in *Pace* supersedes *Siebert I*. Because by its own terms the law-of-the-case doctrine does not apply where "'controlling authority has since made a contrary decision of the law,'" C. Wright, A. Miller, *et al.*, 18B *Federal Practice & Procedure* §4478, at 670 (2d ed. 2002) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)), the *Pace* and law-of-the-case issues are simply two sides of the same coin.[9] By invoking the law-of-the-case

[9] Indeed, Professors Wright and Miller emphasize that "[p]erhaps the most obvious justifications for departing from the law of the case arise when there has been an intervening change of law outside the confines of

doctrine, the Eleventh Circuit, as its opinion makes clear, *necessarily* held that *Pace* does not apply to any state post-conviction time bar that "operate[s] as an affirmative defense." App. 1a. If, on the flip side, *Pace* does apply, then, by definition, the law-of-the-case doctrine does not, because the Eleventh Circuit is not at liberty for any reason (law-of-the-case or otherwise) to ignore this Court's binding precedent.

Accordingly, however framed, the dispositive question here is whether *Pace* applies. The Eleventh Circuit has held, in a published opinion that binds future court panels, *see, e.g.*, *Kuenzel v. Allen*, __ F.3d __, __, 2007 WL 1695110, at *1 (June 13, 2007) (following *Siebert II*),[10] that *Pace* does not apply where the pertinent state statute of limitations "operate[s] as an affirmative defense" rather than a jurisdictional barrier to suit. App. 1a. The Eleventh Circuit's decision in that respect is plainly wrong, and it should be reversed.

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the particular case" and that, even within that subset, "[t]he easiest cases occur when the law has been changed by a body with greater authority on the issue" – for instance, "a higher court in the hierarchy of a single court system." C. Wright, A. Miller, *et al.*, 18B *Federal Practice & Procedure* §4478, at 672 & n.50 (2d ed. 2002) (collecting court of appeals decisions refusing to apply law-of-the-case doctrine in the face of intervening Supreme Court authority). *Accord Moore's Federal Practice* §134.21[3][a] (2007) ("When, in the interim between the first and second decisions of the lower court, a higher court to which the court owes obedience issues an opinion directly on point and irreconcilable with the earlier decision, the court is to disregard the law of the case and is to apply the new precedent.") (collecting cases, including *Davis v. United States*, 417 U.S. 333, 342 (1974)). The Eleventh Circuit purports to follow these established principles. *See Klay v. All Defendants*, 389 F.3d 1191, 1197-98 (11th Cir. 2004) (holding that the law-of-the-case doctrine does not apply where "controlling authority has been rendered that is contrary to the previous decision").

[10] *See also* Eleventh Cir. R. 36-3 I.O.P. 2 ("Under the law of this circuit, published opinions are binding precedent.").

There is no dispute here that without the benefit of statutory tolling under §2244(d)(2) Siebert's federal habeas petition would be barred as untimely. *See* App. 6a, 28a.[11] Nor is there any dispute here that Siebert's Rule 32 petition was itself untimely filed in state court: the certificate of judgment issued May 22, 1990; Siebert filed the Rule 32 petition underlying this action on August 25, 1992, several months beyond the then-applicable two-year deadline. *See supra* at 3. Nor, finally, is there any dispute here that the State invoked Rule 32.2(c)'s time bar as a basis for dismissing Siebert's Rule 32 petition and that the state courts found the petition untimely and dismissed it on that basis. *See supra* at 4-5. The question, therefore, is whether, *despite its lateness* – and, indeed, despite the state courts' unambiguous adjudications of its lateness – Siebert's Rule 32 petition was nonetheless "properly filed" within the meaning of §2244(d)(2), so as to toll the time for filing his federal habeas petition. In *Siebert I*, an Eleventh Circuit panel answered that question "yes." This Court's subsequent decision in *Pace* makes absolutely clear that, in fact, the answer is "no." Now, notwithstanding *Pace*, the same Eleventh Circuit panel has yet again answered the question "yes." The Eleventh Circuit's decision, which defies this Court's on-point precedent, cannot stand.

I. *Pace* Expressly Holds That An Untimely State Post-Conviction Petition Is Not "Properly Filed" For AEDPA Purposes And Thereby Supersedes *Siebert I*.

The argument that *Pace* overrules and supersedes *Siebert I* (whose holding the Eleventh Circuit reiterated, post-*Pace*, in *Siebert II*) is remarkably straightforward. There are two dispositive considerations. *First*, this Court in *Pace* used categorical language to make absolutely clear that, whatever the circumstances, an untimely state post-conviction petition is not "properly filed." And *second*, this Court in *Pace*

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[11] Again, equitable tolling is no longer at issue in this case. *See supra* note 6.

actually referred specifically to Alabama's post-conviction statute of limitations as an example of a "proper[] fil[ing]" condition.

A. This Court In *Pace* Used Unconditional Language To Make Clear That, No Matter The Circumstances, An Untimely State Post-Conviction Petition Is Not "Properly Filed."

The Eleventh Circuit in *Siebert I* and this Court in *Pace* started in exactly the same place. The *Siebert I* court said that "[t]he question before [it was] whether Siebert's Alabama petition[], which [was] accepted by the courts *but ultimately found to have been filed late*, should be considered 'properly filed' within the meaning of AEDPA's tolling provision." App. 26a (emphasis added). The Eleventh Circuit answered that question "yes." Not long thereafter, this Court asked the very same question – "whether a state postconviction petition *rejected by the state court as untimely* nonetheless is 'properly filed' within the meaning of §2244(d)(2)" – but gave precisely the opposite answer: "We conclude that it is not." 544 U.S. at 410 (emphasis added).

Indeed, time and time again, this Court in *Pace* observed – as a categorical matter – that if a state post-conviction petition is determined by the state courts to have been untimely filed, then, by definition, it is *not* "properly filed" within the meaning of §2244(d)(2):

- Initially, this Court reiterated, in no uncertain terms and without exception, what it had said in *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) – namely, that "time limits on postconviction petitions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed.'" *Pace*, 544 U.S. at 413.

- In the same vein, this Court in *Pace* expressly "h[e]ld" – again, using unconditional language – that "[w]hen a postconviction petition is untimely under state law, '*that*

[is] the end of the matter' for purposes of §2244(d)(2)." *Id.* at 414 (emphasis added).

- Continuing, the *Pace* Court concluded – yet again, as a *per se* matter – that "[b]ecause the state court rejected petitioner's [post-conviction] petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under §2244(d)(2)." *Id.* at 417.

- Wrapping up, this Court declared unqualifiedly that state post-conviction "time limits, *no matter their form*, are 'filing' conditions." *Id.* (emphasis added).

- Indeed, even the Justices who dissented in *Pace* recognized that under the Court's categorical rule, "a state application will not be deemed properly filed ... if *the [state] court ultimately determines* that particular claims contained in the application fail to comply with the applicable state statute of limitations." *Id.* at 420 (Stevens, J., dissenting) (emphasis added).

Pace simply couldn't be any clearer. All nine Justices plainly understood that if a state court deems an inmate's state post-conviction petition to have been untimely filed, then, *ipso facto*, the petition is not "properly filed" for AEDPA tolling purposes. In other words, *Pace*'s plain language establishes that the only relevant question in a given case is this: Did the state courts in *this particular* case find *this particular* post-conviction petition to have been untimely filed? If the answer to that question is yes, then – wholly without regard to the form or application of the limitation period – the petition was *not* "properly filed." All here – including the Eleventh Circuit – agree that Siebert's Rule 32 petition was untimely filed, and, more importantly, that the state courts expressly so found. *See supra* at 3-5; App. 26a (Siebert's petition was "ultimately found to have been filed late"). Under the plain language of *Pace*, "that [is] the end of the matter."

Or it should have been, anyway. Instead, by *ipse dixit*, the Eleventh Circuit here (in *Siebert II*) held that the *Pace* rule simply doesn't apply to any state post-conviction statute of limitations "that operate[s] as an affirmative defense" rather than a jurisdictional barrier to suit – again, even where, as here, the time bar is both invoked and enforced. App. 1a. That limitation is a whole-cloth creation. It is utterly irreconcilable with the unambiguous terms in which the *Pace* Court itself repeatedly expressed its holding. Again, the controlling question under *Pace* is whether – not how or pursuant to what kind of rule, but simply *whether* – an inmate's "state postconviction petition [was] rejected by the state courts as untimely." 544 U.S. at 410. As Siebert's case shows, a petition can be untimely, and "rejected by the state courts" as such, *see id.*, just as surely under a defensive time bar as under a jurisdictional one.

It is just not possible to square the Eleventh Circuit's decision with the plain language of *Pace*. The court of appeals' opinion ignores this Court's own words in *Pace* in favor of an exception (*i.e.*, for non-jurisdictional, defensive statutes of limitation) that none of the Members of this Court seems even to have considered, let alone embraced.

B. This Court In *Pace* Pointed Specifically To Alabama Rule 32.2(c)'s Time Bar As An Example Of A "Proper[] Fil[ing]" Condition.

In addition to this Court's categorical language, there is the fact, emphasized by the district court here, that "the Supreme Court itself, in *Pace*, identified Alabama's time bar as one of the very types of rules that constitute 'conditions to filing'" for §2244(d)(2) purposes. App. 61a. Specifically, "[a]t footnote seven, the Court ... gives examples of the types of state procedural rules that constitute 'conditions to filing,' explicitly identifying Alabama's Rule 32.2(c) time limit as one." App. 62a. *Pace*'s footnote 7 – intended to highlight the distinction between "conditions to filing" and "conditions to obtaining relief" – reads as follows:

> *Compare, e.g.,* Pa. Rule Crim. Proc. 901(A) (2005) (titled "Initiation of Post-Conviction Collateral Proceedings" and listing compliance with the time limit as one mandatory condition); 42 Pa. Cons. Stat. § 9545(b) (2002) (titled "Jurisdiction and proceedings" and listing the time limit); *Commonwealth v. Fahy,* 558 Pa. 313, 328, 737 A.2d 214, 222 (1999) (describing the time limit as "jurisdictional"); 2 Ala. Rule Crim. Proc. 32.2(c) (2004-2005) (stating that a court "shall not entertain" a time-barred petition), *with* 42 Pa. Cons. Stat. § 9543(a) (2002) (titled "Eligibility for relief" and listing procedural bars, like those at issue in *Artuz*); 2 Ala. Rule Crim. Proc. 32.2(a) (2004-2005) (stating that a "petitioner will not be given relief" if certain procedural bars, like those at issue in *Artuz,* are present).

Pace, 544 U.S. at 417 n.7.

In footnote 7, therefore, this Court expressly lumped Alabama's post-conviction statute of limitations in with Pennsylvania's, and then contrasted the two limitations periods, as §2244(d)(2) "proper[] fil[ing]" conditions, with run-of-the-mill procedural bars, which merely "go to the ability to obtain relief." *Id.* at 417. Plainly, then, this Court "considered Alabama's Rule 32.2(c) to be the type of rule that is a 'condition to filing,' violation of which would preclude the petition from being 'properly filed' for §2244(d)(2) purposes." App. 62a-63a.

Siebert's (and, implicitly, the Eleventh Circuit's) response to *Pace*'s footnote 7 is to say that that it refers to the Pennsylvania post-conviction time limit there at issue in "jurisdictional" terms. *See* C.A. Blue Br. 12, 18-19. That is true, but it misses the point entirely. The point is that the balance of footnote 7 expressly places Alabama's Rule 32.2(c) – whether technically "jurisdictional" or not – *right alongside* Pennsylvania's rule as a "proper[] fil[ing]" requirement. The point is that the Court in *Pace* singled out

Alabama's Rule 32.2(c) as the very kind of rule it had in mind when it held that state post-conviction time bars are conditions to filing and, therefore, "proper[] fil[ing]" requirements within the meaning of §2244(d)(2).

II. The Eleventh Circuit's Holding In *Siebert II* That *Pace* Applies Only To Jurisdictional Statutes Of Limitation, And Not To Those That "Operate[] As An Affirmative Defense," Is Indefensible.

The crux of the Eleventh Circuit's holding in *Siebert II* (and its effort to salvage its earlier opinion) is its assertion that "*Pace* did not address ... a statute of limitations that operated as an affirmative defense." App. 1a. Thus, even after *Pace*, the Eleventh Circuit is clearly sticking with its pre-*Pace* view "that in order for a state collateral petition in Alabama to have been 'properly filed' for §2244(d)(1) tolling purposes, it is not necessary for that petition to have met the state's own statute of limitations, unless that statute of limitations is jurisdictional in nature." *Hurth*, 400 F.3d at 861 (citing *Siebert I*, 334 F.3d at 1032).

Tellingly, in the Eleventh Circuit, Siebert himself expressly disavowed any suggestion that §2244(d)(2)'s application should turn on a distinction between jurisdictional and defensive statutes of limitation: "Mr. Siebert does not contend that only jurisdictional rules are conditions of filing or even that only statutes of limitations which are jurisdictional are conditions of filing." C.A. Gray Br. 18. Any such argument, he told the Eleventh Circuit, "*would conflict with* Pace." *Id.*[12] Siebert was exactly right

[12] That is not to say that Siebert threw in the towel before the Eleventh Circuit. Instead, before that court, Siebert objected principally that his failure to comply with Rule 32.2(c) should not preclude a finding that his post-conviction petition was "properly filed" under 2244(d)(2) because, he said, Rule 32.2(c) was not "firmly established and regularly followed" at the time he filed. *See* C.A. Blue Br. 13-15; C.A. Gray Br. *passim*. The State responded that *Pace* leaves no room for a consistent-application gloss on §2244(d)(2)'s plain language and, more importantly, that the Eleventh Circuit (indeed, the same panel in a parallel case involving

about that; the court of appeals should have heeded his warning.[13] As matters stand now, the Eleventh Circuit's decision restricting *Pace*'s application to jurisdictional time bars – and refusing its application to defensive time bars – directly conflicts with the plain language of the *Pace* opinion itself, undermines the purposes that animate AEDPA's limitations and tolling provisions, and defies common sense.

A. The Eleventh Circuit's Holding Directly Conflicts With The Plain Language Of This Court's Opinions In *Pace* and *Artuz v. Bennett*.

Is there any basis in the language of the *Pace* opinion itself for the Eleventh Circuit's imagined distinction between jurisdictional and defensive time bars? None whatsoever. It is certainly true, as we have said, that the Pennsylvania rule at issue in *Pace* was described as a "jurisdictional" time bar. *Pace*, 544 U.S. at 417 n.7. But there is absolutely *no* indication that the seemingly jurisdictional character of the Pennsylvania statute mattered to – let alone controlled – this Court's analysis or holding. Indeed, the evidence, even on the face of the opinion itself, is dispositively to the contrary.

1. As an initial matter, the categorical language of *Pace* does not distinguish between time bars that are jurisdictional and those that operate as affirmative defenses. By contrast,

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Siebert himself) has held that Rule 32.2(c) *was* "firmly established and regularly followed" at the time Siebert filed. *Siebert v. Allen*, 455 F.3d 1269, 1271-72 (11th Cir. 2006) (citing *Hurth v. Mitchem*, 400 F.3d 857, 863 (11th Cir. 2005)), *cert. denied*, 127 S. Ct. 1823 (2007). The consistent-application issue is thus irrelevant here. In any event, in the decision under review, the court of appeals made nothing of the consistent-application issue, and 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. App. 1a.

[13] And ours. We presented the same argument to the Eleventh Circuit that we are presenting here (C.A. Red Br. 11-20) and, particularly contended there, as here, that *Pace* cannot reasonably be read to apply only to jurisdictional time bars (C.A. Red Br. 20-22).

Pace holds, unequivocally and without exception, that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)"; that "time limits, no matter their form, are 'filing' conditions"; and that where a "state court rejected [a] petitioner's [post-conviction] petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under §2244(d)(2)." 544 U.S. at 414, 417. Accordingly, under *Pace*'s plain language it just doesn't matter whether a state post-conviction time bar is jurisdictional or, instead, "operate[s] as an affirmative defense." App. 1a. All that matters, as we have said, is that the state courts in *this* case found *this* post-conviction petition to have been untimely filed. In that circumstance (which clearly obtains here), the state petition was not "properly filed" for §2244(d)(2) purposes. In other words, while *Pace* may by happenstance have arisen against the backdrop of a jurisdictional time bar, it is clear from the language it chose that this Court generalized its holding, in the interest of establishing an unambiguous rule, to include *all* state-court determinations of untimeliness.[14]

2. Moreover, as the district court here correctly recognized, not only is there "[n]othing in *Pace* or §2244(d) [that] says that only 'jurisdictional' rules constitute 'conditions to filing'" but, indeed, "many of the 'conditions to filing' identified by the Supreme Court" in *Pace*'s predecessor, *Artuz v. Bennett*, 531 U.S. 4 (2000), are quite obviously *not* strictly jurisdictional. App. 61a. In *Artuz*, this Court listed four common "proper[] fil[ing]" requirements:

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[14] Notably, this Court in *Pace* had every opportunity to limit the scope of its holding to technically jurisdictional state time bars. The respondent there repeatedly emphasized the jurisdictional character of Pennsylvania's post-conviction statute of limitations. *See* Br. of Respondent at 4-5, 7, 9-10, 12-18, 25-28, 35, *Pace* (No. 03-9627). This Court's published opinion, however, uses language that plainly applies to all state-court determinations of untimeliness, whether jurisdictional or not.

Alongside (1) "time limits upon [a petition's] delivery" (the filing condition reiterated in *Pace*), the *Artuz* Court mentioned (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. at 8. *None* of those requirements, as the district court here understood, is "jurisdictional in the sense that the court lacks power to deal with the matter." App. 61a. Accordingly, the Eleventh Circuit's determination that only jurisdictional rules can be "proper[] fil[ing]" requirements – and, therefore, that because Rule 32.2(c)'s time bar "operated as an affirmative defense" it cannot be a filing condition – is doubly wrong: It is irreconcilable not only with *Pace* but also with *Artuz*.

B. The Eleventh Circuit's Holding Undermines The Purposes That Animate AEDPA's Limitations And Tolling Provisions.

It is not just the face of *Pace* that the Eleventh Circuit's decision here contradicts, but also *Pace*'s underlying logic. In *Pace*, this Court emphasized that "[t]he purpose of AEDPA's statute of limitations confirms th[e] commonsense" understanding that an untimely state post-conviction petition is, by definition, not "properly filed" within the meaning of §2244(d)(2). 544 U.S. at 413. Specifically, this Court was concerned that "[o]n petitioner's theory" – under which timely filing in state court would *not* have been a "proper[] fil[ing]" requirement – "a state prisoner could toll [AEDPA's] statute of limitations at will simply by filing untimely state postconviction petitions." *Id.* That, the Court said, "would turn §2244(d)(2) into a *de facto* extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay." *Id.*

The *Pace* Court assumed that in holding that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)," *id.* at 414, it had eliminated the risk that inmates would, as respondent argued there, "give themselves their own

extensions" – and thereby toll AEDPA's time bar indefinitely – merely "by filing an untimely state post-conviction petition." Brief of Respondent at 32, *Pace* (No. 03-9627). The Eleventh Circuit's decision here, however, resurrects that risk with respect to all inmates imprisoned in States (of which there are many, *see infra* at 25-30) whose post-conviction time bars are not strictly jurisdictional but, instead, "operate[] as an affirmative defense." App. 1a. In those States, an inmate may once again unilaterally extend the time for filing his federal habeas petition simply by lodging an untimely state petition – even in a case, like this one, in which (1) all agree that the state petition is time-barred, (2) the State expressly invokes the time bar, and (3) the state courts unambiguously find the petition to have been untimely filed and dismiss the petition on that basis.

That state of affairs – which follows straightaway from the Eleventh Circuit's artificial distinction between jurisdictional and defensive time bars – is irreconcilable with "AEDPA's acknowledged purpose of 'reduc[ing] delays in the execution of state and federal criminal sentences.'" *Schriro v. Landrigan*, 127 S. Ct. 1933, 1940 (2007) (quoting *Woodford v. Garceau*, 538 U.S. 202, 206 (2003)). Worse, it is irreconcilable with the specific purpose of AEDPA's own limitations period, which is to "'restrict[] the time that a prospective federal habeas petitioner has in which to seek federal habeas review'" and thereby to "'reduc[e] the potential for delay on the road to finality.'" *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (quoting *Duncan v. Walker*, 533 U.S. 167, 179 (2001)).

C. The Eleventh Circuit's Holding Defies Common Sense.

In deciding the case the way it did – by wagering everything on a distinction between jurisdictional and defensive state time bars – the Eleventh Circuit seems to have lost sight of the fact that the point here is to interpret a statute, and that the controlling statutory term is "properly

filed." The question in this case, therefore, is whether Siebert's Rule 32 petition was "properly filed" within the meaning of §2244(d)(2). In *Pace*, this Court harked back to *Artuz*'s instruction that, in interpreting §2244(d)(2), courts should be "guided by the 'common usage' and 'commo[n] underst[anding]' of the phrase 'properly filed.'" *Pace*, 544 U.S. at 413 (quoting *Artuz*, 531 U.S. at 8, 9). In common and ordinary usage, the *Pace* Court held simply, a *late* petition is not a "properly filed" petition.

It is difficult to imagine why 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. (And, indeed, recall that *Artuz*'s own catalogue of "proper[] fil[ing]" requirements referred only to *non*-jurisdictional rules. *See supra* at 19-20.) The fact that a state statute of limitations technically "operate[s] as an affirmative defense" (App. 1a) rather than a jurisdictional bar does not make a late-filed post-conviction petition any less late or, on the flip side, any more "proper[]." That is self-evidently true in a case like this one, where (1) all agree that the state petition was filed late, (2) the State expressly invoked the post-conviction time bar, and (3) the state courts flatly rejected any contention that the State had waived the time bar and, instead, enforced the bar by dismissing the petition. In that circumstance – the circumstance presented by this case – what possible difference could it make that the state statute of limitations was formally an affirmative defense rather than a jurisdictional barrier? The answer seems clear: none at all.[15] The Eleventh Circuit's decision

[15] This is not a case in which the state courts found that a State had waived a defensive time bar and, on the basis of that waiver, went on to address the merits of a state post-conviction petitioner's claims. In that instance, a State, to be sure, could not seek to un-ring the bell by contending in federal court that, despite its state-court waiver, the petitioner's state petition was technically untimely and, therefore, not "properly filed." But where, as here, the state courts explicitly reject waiver arguments, find the state petition untimely, and dismiss it on that basis, "'that [is] the end of the matter' for purposes of §2244(d)(2)."

rests on a formalistic distinction between jurisdictional and defensive statutes of limitation that has absolutely no basis in §2244(d)(2)'s "proper[] fil[ing]" criterion or in the reality of post-conviction litigation more generally.[16]

III. The Eleventh Circuit's Decision Implicates A Question Of National Importance.

The State, of course, appreciates the fact that this Court "has traditionally expended its time and resources on those cases that present issues of national importance ...." R. Stern, E. Gressman, *et al.*, *Supreme Court Practice* §4.2, at 223 (8th ed. 2002). This is just such a case. Alabama is by no means the only State affected here. The distinction at the heart of the Eleventh Circuit's decision – between jurisdictional time bars, which, it held, are §2244(d)(2) "proper[] fil[ing]" conditions, and defensive time bars, which are not – leaves a whole host of States right back where they started before this Court decided *Pace*.

Pace, 544 U.S. at 414. *Accord id.* at 410 (looking to whether state petition was "rejected by the state court as untimely"); *id.* at 417 (looking to whether "the state court rejected petitioner's [post-conviction] petition as untimely"); *cf. Evans v. Chavis*, 127 S. Ct. 846, 852 (2006) (looking to whether state courts gave any clear indication that a particular filing "was timely or untimely").

[16] The fact that *Pace* was a closely contested, 5-to-4 decision is irrelevant at this juncture. Whatever one's view about the Court's macro-level decision there that timely filing under state law is a "proper[] fil[ing]" requirement, there is no good reason to distinguish between jurisdictional and defensive time bars in applying that rule. Indeed, in his dissent, Justice Stevens argued that "most state laws respecting untimely filings of postconviction petitions" function as waivable affirmative defenses. *Pace*, 544 U.S. at 426 (Stevens, J., dissenting). Nonetheless, he recognized that under the rule adopted by the Court, "a state application will not be deemed properly filed ... if the [state] court ultimately determines that particular claims contained in the application fail to comply with the applicable state statute of limitations." *Id.* at 420. State time bars – all of them – either are or are not "proper[] fil[ing]" requirements. There is no basis, either in *Pace* or elsewhere, for including some in that category but excluding others.

First, a bit of background: As a rule, statutes of limitation are *not* jurisdictional but instead, in the Eleventh Circuit's words, "operate[] as an affirmative defense." App. 1a. Perhaps most conspicuously, the Federal Rules of Civil Procedure expressly characterize "statute[s] of limitations" as "affirmative defense[s]," Fed. R. Civ. P. 8(c), and distinguish them from jurisdictional matters, *see* Fed. R. Civ. P. 12(b), (h). *Accord* C. Wright, A. Miller, *et al.*, 5 *Federal Practice & Procedure* §1278, at 644-45 & 656 n.12 (3d ed. 2004) (observing that under Federal Rules, statute of limitations is an "affirmative defense").

So, too, even outside the standard civil-procedure context, this Court has repeatedly recognized that statutes of limitation are affirmative defenses rather than jurisdictional barriers to suit. Most recently (and relevantly), this Court made precisely that observation about AEDPA's own one-year time bar: "A statute of limitations defense ... is not 'jurisdictional.'" *Day v. McDonough*, 126 S. Ct. 1675, 1681 (2006); *accord id.* at 1686 (Scalia, J., dissenting) ("We have repeatedly stated that the enactment of time-limitations periods such as that in §2244(d), without further elaboration, produces defenses that are nonjurisdictional ...."). Other examples abound. *See, e.g.*, *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1242 (2006) ("[T]ime prescriptions, however emphatic, 'are not properly typed "jurisdictional."'"); *Eberhart v. United States*, 126 S. Ct. 403, 404-05 (2005) (Federal Rule of Criminal Procedure 33's 7-day limitation period on motions for new trials is "nonjurisdictional" affirmative "defense"); *Kontrick v. Ryan*, 540 U.S. 443, 452-60 (2004) (bankruptcy rules' 60-day timely-filing requirement is a "claim-processing rule" that is not "jurisdictional" but, rather, provides an "affirmative defense"); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004) (Equal Access to Justice Act's 30-day timely-filing provision is not "jurisdictional"); *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even rigid ones,

under the heading 'subject matter jurisdiction.'"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (EEOC timely-filing requirement is "not a jurisdictional prerequisite" but, rather, "like a statute of limitations," an affirmative defense). Indeed, at least as far back as 1887, this Court recognized the "general rule" that a statute of limitations "does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions." *Finn v. United States*, 123 U.S. 227, 232-33 (1887).[17]

State courts likewise treat statutes of limitation as defensive rather than strictly jurisdictional. The leading legal encyclopedias agree that while "[t]he expiration of a statute of limitations is an affirmative defense that may deprive a litigant of his or her right to recover," it "is not a jurisdictional defect," 54 C.J.S. *Limitations of Actions* §14 (Apr. 2007) (collecting decisions from Arkansas, California, Idaho, Illinois, Oklahoma, Texas, and Utah), and that "a statute of limitation generally is not jurisdictional" but, rather, "must be pleaded as an affirmative defense," 51 Am.Jur.2d *Limitation of Actions* §20 (Apr. 2007) (collecting decisions from Arizona, Arkansas, Colorado, Missouri, Rhode Island, and Utah).

Which brings us to state post-conviction time bars, specifically. That, of course, is where the rubber truly meets the road here. Against the foregoing backdrop, it is altogether unsurprising that our research indicates that, in addition to Alabama, at least 16 States treat their state post-conviction statutes of limitation as affirmative defenses

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[17] In *Kontrick*, this Court emphasized that "[c]larity would be facilitated if courts and litigants would use the label 'jurisdictional' not for claim-processing rules" like timely-filing requirements, "but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) within a court's adjudicatory authority." 540 U.S. at 455.

rather than as mandatory jurisdictional barriers: Alaska,[18] California,[19] Colorado,[20] Idaho,[21] Illinois,[22] Iowa,[23] Kansas,[24]

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[18] *See Nelson v. State*, 2003 WL 1731624, at *3-4 (Alaska Ct. App. Apr. 2, 2003) (unpublished) (observing that Alaska Statutes §12.72.020(a)(3)'s statute of limitations is "an affirmative defense" that may, in certain circumstances, be waived).

[19] *See In re Robbins*, 77 Cal. Rptr. 2d 153, 159 (Cal. 1998) (describing flexible timeliness standards inconsistent with treatment as strictly jurisdictional); *In re Clark*, 21 Cal. Rptr. 2d 509, 517-18 (Cal. 1993) (same).

[20] *See People v. Lanford*, 867 P.2d 50, 51 (Colo. Ct. App. 1993) (holding that compliance with state post-conviction time bar "is not a jurisdictional prerequisite for the review of the merits of [a petitioner's] attack"); *People v. Shackelford*, 851 P.2d 218, 221 (Colo. Ct. App. 1993) ("[F]ailure to attack the convictions in a timely manner does not implicate the jurisdiction of this court to resolve defendant's contentions."). Even after the Colorado post-conviction statute was amended in 1998 to permit (but not require) courts to notice untimeliness *sua sponte*, courts continue to recognize their discretion to entertain late petitions where the defense is not raised in the trial court. *See People v. Kilgore*, 992 P.2d 661, 662-63 (Colo. Ct. App. 1999).

[21] *See Kirkland v. State*, 149 P.3d 819, 821 (Idaho 2006) ("The statute of limitations for petitions for post-conviction relief is not jurisdictional. It 'is an affirmative defense that may be waived if it is not pleaded by the defendant.'" (quoting *Cole v. State*, 15 P.3d 820, 823 (Idaho 2000)).

[22] *See People v. Boclair*, 789 N.E.2d 734, 739-42 (Ill. 2002) (holding that state post-conviction time bar is not a "jurisdictional prerequisite" but, rather, "an affirmative defense and can be raised, waived, or forfeited by the State").

[23] *See Blackwell v. State*, __ N.W.2d __, 2007 WL 914074, at *1 (Iowa Ct. App. Mar. 28, 2007) (observing that post-conviction statute of limitations "is an affirmative defense generally raised by a responsive pleading") (citing *Davis v. State*, 443 N.W.2d 707, 708 (Iowa 1989)).

[24] *See Alexander v. State*, 2007 WL 1309605, at *1 (Kan. Ct. App. May 4, 2007) (unpublished) (holding that state post-conviction time bar is "not jurisdictional, but rather an affirmative defense which must be pled"); *see also Johnson v. State*, 2007 WL 570182, at *4 (Kan. Ct. App. Feb. 23, 2007 (unpublished) ("affirmative defense"); *Scott v. State*, 2006 WL 3740876, at *4 (Kan. Ct. App. Dec. 15, 2006) (unpublished) ("affirmative defense").

Kentucky,[25] Maine,[26] Minnesota,[27] New Jersey,[28] Oregon,[29] South Carolina,[30] South Dakota,[31] Utah,[32] and Wisconsin.[33]

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[25] *See Justice v. Commonwealth*, 2006 WL 73456, at *1-2 (Ky. Ct. App. Apr. 12, 2006) (unpublished) (holding that the state post-conviction time bar is a "statute of limitations defense [that] must be affirmatively pled" and that "a failure to do so constitutes a waiver of that defense"); *Ballanger v. Commonwealth*, 2003 WL 21472662, at *3 (Ky. Ct. App. June 27, 2003) (unpublished) (citing *Bowling v. Commonwealth*, 964 S.W.2d 803, 805 (Ky. 1998), and analogizing state post-conviction time bar to 28 U.S.C. §2244(d)(1), which, the court said, "is a statute of limitations rather than a jurisdictional bar").

[26] *See Diep v. State*, 748 A.2d 974, 975 (Me. 2000) (holding that state post-conviction time bar does not implicate "subject matter jurisdiction").

[27] *See State v. Smith*, 2007 WL 1053335 (Minn. Ct. App. Apr. 10, 2007) (unpublished) (observing that under *Kost v. State*, 356 N.W.2d 680, 682 (Minn. 1984), and *Wensman v. State*, 342 N.W.2d 150, 151 (Minn. 1984), timeliness is only a bar where the State has been prejudiced by the delay or the petitioner has abused process). The Minnesota Legislature recently enacted a 2-year post-conviction statute of limitations to replace its abuse-of-the-writ regime. *See* Minn. Stat. §590.01 subd. 4(a) (effective Aug. 1, 2005). Our research does not reveal that any court has yet characterized the new limit as either jurisdictional or defensive. Minnesota, therefore, is also appropriately placed in the "twilight zone" category, *see infra* at 28-29.

[28] See *State v. Afanador*, 697 A.2d 529, 534 (N.J. 1997) (observing that state post-conviction time bar is flexible and may be relaxed according to factors such as a petitioner's "excusable neglect" and the degree of prejudice to the State); *see also State v. Pantusco*, 2006 WL 1549687, at *4 (N.J. App. Div. June 8, 2006) (unpublished) (referring to state post-conviction statute of limitations as a "time bar defense" that State could opt not to invoke).

[29] *See Palmer v. State*, 854 P.2d 955, 956 (Or. Ct. App. 1993) (holding that state post-conviction time bar is "not a limitation on the jurisdiction of the post-conviction court" but, rather, an "affirmative defense").

[30] *See Carter v. State*, 522 S.E.2d 342, 343 (S.C. 1999) (holding that State may "agree[] that the petitioner should be allowed to" file an out-of-time application and that, if it does so, it will be "estopped from asserting the statute of limitations as a defense").

[31] *See Flute v. Class*, 559 N.W.2d 554, 557 (S.D. 1997) (observing that post-conviction statute "authorizes (but does not mandate) the dismissal" of a petition whose late filing has prejudiced the State's ability to respond); *see also Jenner v. Dooley*, 590 N.W.2d 463, 468 (S.D. 1999)

Cf. also Carey v. Saffold, 536 U.S. 214, 225 (2002) (observing that there are "many" reasons that a state post-conviction court "will sometimes address the merits of a claim that it believes was presented in an untimely way," something it couldn't do if the time bar were truly jurisdictional). In addition, a number of other States presently exist in something of a twilight zone; their courts either have not expressly said whether their post-conviction statutes of limitation are jurisdictional or defensive or have issued contradictory pronouncements on the subject: Delaware,[34] Georgia,[35] Indiana,[36] Maryland,[37] Nevada,[38] North Carolina,[39] Oklahoma,[40] and Virginia.[41]

(holding that petitioner must be given opportunity to rebut presumption of prejudice that attaches at five years).

[32] *See Johnson v. State*, 134 P.3d 1133, 1137 (Utah 2006) (holding that state post-conviction time bar "is not absolute" but, rather, contains an interests-of-justice "safety valve" allowing for the consideration of an untimely petition); *Frausto v. State*, 966 P.2d 849, 851 (Utah 1998) (holding that a hard-and-fast limitation period may never be applied to bar a habeas petition and that "proper consideration of meritorious claims raised in a habeas petition will always be in the interests of justice" for purposes of permitting the untimely filing); *cf. James v. Galetka*, 965 P.2d 567, 570-73 (Utah Ct. App. 1998) (observing that statutes of limitation, in both the civil and the criminal context, are "affirmative defenses," not prerequisites to "subject matter jurisdiction").

[33] *See Coleman v. McCaughtry*, 714 N.W.2d 900, 902, 905-08 (Wisc. 2006) (holding that state habeas petition premised on claim of ineffective assistance of appellate counsel is subject to doctrine of laches, which is "affirmative defense" with respect to which the State bears the burdens of pleading and proof); *Jones v. State*, 233 N.W.2d 441, 446 (Wisc. 1975) (holding that the court-established 90-day limit for motions to reconsider sentence is "regulatory rather than jurisdictional," that a trial court may "entertain motions beyond that time in the exercise of its discretion"). Wisconsin courts have not definitively determined whether a laches or any other timeliness defense applies to other post-conviction petitions. *See, e.g., State v. Felton*, 2005 WL 1342213, at *8 (Wisc. Ct. App. June 7, 2005) (unpublished).

[34] *Compare State v. Watson*, 2002 WL 1652293, at *1 (Del. Super. July 19, 2002) (stating that time bar is "jurisdictional," at least to the extent that it "may not be enlarged"), *with State v. Allen*, 1990 WL 1104263, at

To be sure, there are States whose courts have deemed their post-conviction time bars to be jurisdictional,[42] and

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*1 (Del. Super. Jan. 24, 1990) (noting that State had "agreed to waive" the time bar then granting partial relief on the merits), and *State v. Dickens*, 602 A.2d 95, 99 (Del. Super. 1989) (time bar is "by no means absolute or unconditional").

[35] *See* O.C.G.A. §9-14-42(c) (1-year post-conviction time bar for misdemeanants and 4-year post-conviction time bar for felons). Our research did not identify any decisions definitively construing this provision as jurisdictional or defensive in nature.

[36] *See Corcoran v. State*, 845 N.E.2d 1019 (Ind. 2006) (offering no discussion of post-conviction time bar's character as jurisdictional or defensive).

[37] *See* Md. Crim. Proc. §7-103 (10-year time bar in non-capital capital cases absent showing of "extraordinary cause"); *id.* §7-201 (210-day time bar in capital cases, subject to "good cause" exception). Our research did not identify any decisions definitively construing these provisions as jurisdictional or defensive in nature.

[38] *Compare Clem v. State*, 81 P.3d 521, 525 (Nev. 2003) (observing that petitioner may overcome state post-conviction time bar "with a sufficient showing of good cause and actual prejudice" and thereby suggesting that time bar is not strictly mandatory or jurisdictional), *with Sullivan v. State*, 96 P.3d 761, 764 n.6 (Nev. 2004) (suggesting, in footnote, that State could not "stipulate" that post-conviction petition was timely).

[39] *See* N.C. Gen. Stat. §15A-1415(a) (120-day post-conviction time bar in capital cases); *id.* §15A-1419(a)-(b) (denial warranted on basis of untimeliness, subject to "good cause" and "miscarriage of justice" exceptions). Our research did not identify any decisions definitively construing the time bar as jurisdictional or defensive in nature.

[40] *See* 22 Okla. St. Ann. §1089(D)(1) (90-day post-conviction time bar in capital cases). Our research did not identify any decisions definitively construing this provision as jurisdictional or defensive in nature.

[41] *See Hines v. Kuplinski*, 591 S.E.2d 692 (Va. 2004) (offering no discussion of post-conviction time bar's character as jurisdictional or defensive).

[42] *See Benton v. State*, 925 S.W.2d 401, 402 (Ark. 1996) ("The time limitations imposed in Rule 37 are jurisdictional in nature, and the circuit court may not grant relief on a petition for postconviction relief which is not properly filed."); *State v. Celestine*, 894 So. 2d 1197, 1198 (La. Ct. App. 2005) (post-conviction time bar is "jurisdictional"); *Walters v. State*, 933 So. 2d 313, 315 (Miss. Ct. App. 2006) (dicta) (post-conviction

there are a few others that do not presently impose time limitations on post-conviction filings.[43] The point remains, however, that even as matters stand now, the rationale of the Eleventh Circuit's decision here – refusing to apply *Pace* to any state post-conviction time bar that is not strictly jurisdictional in nature – effectively nullifies *Pace*'s clear holding in as many as half the States in the country. It is inconceivable that, having expressly held that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of §2244(d)(2)," 544 U.S. at 414, this Court in *Pace* intended – silently – to exempt an entire class of state time bars from that categorical rule.

CONCLUSION

The Eleventh Circuit's decision is both plainly wrong and, in real-world terms, quite significant. This Court should grant the petition for certiorari and either summarily reverse or set the case for briefing and argument.

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time bar is "jurisdiction[al]"); *Peña v. State*, 100 P.3d 154, 163 (Mont. 2004) (post-conviction time bar is "jurisdictional" and "cannot be waived by the State"); *State v. Herbstman*, 974 P.2d 177, 179 (N.M. Ct. App. 1998) (post-conviction time bar "jurisdictional"); *State v. Biddings*, 2005 WL 1482875, at *1-2 (Ohio Ct. App. June 23, 2005) (post-conviction time bar "jurisdiction[al]"); *Greene v. State*, 2007 WL 1215022, at *5 (Apr. 25, 2007) (post-conviction time bar "jurisdictional").

[43] *See* D.C. Code §23-110; Hawaii St. Penal P. Rule 40; Mass. R. Crim. P. 30; Neb. Rev. Stat. §29-3001; N.H. Rev. Stat. §534:1 *et seq.*; N.Y. Crim. Proc. §440.10; N.D. Cent. Code §29-32.1-03; R.I. Gen. Laws §10-9.1-3; 13 Vt. Stat. Ann. §7131; W. Va. Code §53-4A-1.

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