No.

In the Supreme Court of the United States

MARLON SCARBER, PETITIONER

v.

CARMEN DENISE PALMER, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under 28 U.S.C. 2244(d)(2), the limitations period for filing a federal habeas petition challenging a state conviction is tolled for the time that the petitioner could seek further review in state court of the denial of an application for state post-conviction relief, regardless of whether the petitioner ultimately does so.

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Marlon Scarber respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 808 F.3d 1093. The opinion and order of the district court (App., *infra*, 10a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2015. A petition for rehearing was denied on January 29, 2016 (App., *infra*, 8a-9a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2244(d)(2) of Title 28 of the United States Code provides as follows:

> 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.

STATEMENT

This case presents one of the last major circuit conflicts concerning the timing of the filing of federal habeas petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That statute provides that a state prisoner ordinarily must file a federal habeas petition challenging a state conviction within one year of the date on which the conviction becomes final on direct review. 28 U.S.C. 2244(d)(1). The limitations period is tolled, however, for the time that "a properly filed application for State post-conviction or other collateral review" is "pending" in state court. 28 U.S.C. 2244(d)(2). The question presented here is whether the limitations period is tolled for the time that the petitioner could seek further review in state court of the denial of an application for state post-conviction relief, regardless of whether the petitioner ultimately does so.

In this case, petitioner, a Michigan inmate, filed a federal habeas petition after two unsuccessful state applications for post-conviction relief. In each instance, the Michigan Supreme Court denied leave to appeal; petitioner had 21 days to seek reconsideration of the denial, but ultimately did not do so. It is undisputed that the timeliness of petitioner's federal habeas petition turned on the availability of tolling for those 21-day reconsideration periods.

The district court dismissed the petition as untimely, and the court of appeals affirmed. The court of appeals held that, because petitioner had not sought reconsideration, he was not entitled to tolling for the time that he could have done so. In so holding, the court of appeals acknowledged that its decision deepened an already substantial circuit conflict on the question whether, under 28 U.S.C. 2244(d)(2), the limitations period is tolled for the time that a federal habeas petitioner could seek further review in state court of the denial of an application for state post-conviction relief, regardless of whether the petitioner ultimately does so. Because this case is an ideal vehicle for resolving an intractable conflict on an important and frequently recurring question of federal law, the petition for a writ of certiorari should be granted.

1. When Congress enacted AEDPA, it adopted a one-year limitations period for the filing of federal habeas petitions challenging state convictions. 28 U.S.C. 2244(d)(1). In most cases, that one-year period runs from the date on which the petitioner's state conviction becomes final, whether by "the conclusion of direct review" or "the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). At the same time that Congress adopted its stringent one-year limitations period, it included a tolling provision to account for situations in which a prisoner seeks collateral review in state court. That provision states that "[t]he 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" the one-year limitations period. 28 U.S.C. 2244(d)(2).

2. Petitioner is an inmate in the Michigan Reformatory, a Michigan state prison. In 2006, petitioner was

convicted of first-degree murder and other offenses stemming from his involvement in a kidnapping and armed robbery that resulted in the death of the victim. Petitioner was subsequently sentenced to life imprisonment. The Michigan Court of Appeals affirmed. Nos. 273443, 273543 & 273955, 2007 WL 4209366, at *9 (Nov. 29, 2007). On December 19, 2008, the Michigan Supreme Court denied petitioner's application for leave to appeal. 759 N.W.2d 361, 380. Petitioner did not seek further review.

On November 12, 2009, petitioner filed a motion in Michigan state court to dismiss the charges for lack of jurisdiction. The trial court denied the motion, and the Michigan Court of Appeals affirmed. App., *infra*, 2a. On March 8, 2011, the Michigan Supreme Court denied petitioner's application for leave to appeal, concluding that petitioner had not established he was entitled to relief under Michigan Court Rule 6.508(D). 794 N.W.2d 581. Petitioner again did not seek further review.

By no later than August 4, 2011, petitioner filed a motion in Michigan state court for relief from the judgment, raising a variety of claims. The trial court denied the motion, and the Michigan Court of Appeals affirmed. App., *infra*, 2a. On November 25, 2013, the Michigan Supreme Court denied petitioner's application for leave to appeal, again concluding that petitioner had not established he was entitled to relief under Michigan Court Rule 6.508(D). 839 N.W.2d 481. Petitioner again did not seek further review.

3. On December 6, 2013, petitioner filed a pro se petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan.

a. In the answer to the petition, respondent, the warden of the prison where petitioner is incarcerated,

argued that the petition was untimely. Respondent asserted the limitations period operated as follows:

(1) The direct review of petitioner's conviction concluded on December 19, 2008, when the Michigan Supreme Court denied his application for leave to appeal. Petitioner then had 90 days—until March 19, 2009—to file a petition for a writ of certiorari in this Court. Because he did not do so, the limitations period began to run on March 20, 2009, the day after the 90-day period expired. See Resp. D. Ct. Answer 17; Resp. C.A. Br. 17.

(2) Under 28 U.S.C. 2244(d)(2), the limitations period stopped running on November 12, 2009, when petitioner filed his first application for post-conviction relief in Michigan state court. At that point, 237 days of the one-year limitations period had passed, and 128 days remained. See Resp. D. Ct. Answer 18; Resp. C.A. Br. 17.[1]

(3) The limitations period began to run again on March 9, 2011, the day after the Michigan Supreme Court denied petitioner's application for leave to appeal the denial of the first application for post-conviction relief. See Resp. D. Ct. Answer 18; Resp. C.A. Br. 17.

(4) The limitations period expired 128 days later, on July 15, 2011. Because petitioner did not file his federal habeas petition until December 6, 2013, that petition was untimely. See Resp. D. Ct. Answer 18; Resp. C.A. Br. 17, 20.

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[1] In the district court, respondent erroneously stated that 243 days, not 237 days, had elapsed as of that date; respondent corrected that error in her brief on appeal.

b. In his reply brief, petitioner took issue with the third and fourth steps of respondent's analysis. Under Section 2244(d)(2), he argued, the limitations period did not begin to run again when the Michigan Supreme Court denied his application for leave to appeal the denial of the first application for post-conviction relief. That is because the Michigan rules gave petitioner 21 days after the certification of the order denying leave to appeal to move for reconsideration. See Mich. Ct. R. 7.311(G). For those 21 days, petitioner contended, his application for post-conviction relief was still "pending," and the limitations period still tolled, under Section 2244(d)(2).

Thus, according to petitioner, the remainder of the analysis should proceed as follows:

(3) The limitations period began to run again on March 30, 2011, the day after the last day on which petitioner could have sought review of the denial of the first application for post-conviction relief by filing a motion for reconsideration. See Pet. D. Ct. Reply 5.

(4) The limitations period would have expired 128 days later, on August 5, 2011. The limitations period stopped running again by no later than August 4, 2011, when petitioner filed his second application for post-conviction relief in Michigan state court. See Pet. D. Ct. Reply 6.[2]

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[2] Petitioner signed the application on July 28, 2011, and it was stamped "filed" on August 4, 2011. See D. Ct. Dkt. 11-16, at 1, 25 (June 18, 2014). Because it was undisputed that petitioner's federal habeas petition would be timely if the question presented were resolved in his favor, the court of appeals had no occasion to reach the question of which date triggers the tolling period in Section 2244(d)(2).

(5) On November 25, 2013, the Michigan Supreme Court denied petitioner's application for leave to appeal the denial of the second application for post-conviction relief. On December 6, 2013—before the 21-day period for filing a motion for reconsideration had run—petitioner filed his federal habeas petition, and the petition was therefore timely. See Pet. D. Ct. Reply 6.

4. The district court dismissed petitioner's habeas petition as untimely. App., *infra*, 10a-18a. After running through the foregoing calculations, it held that "the statute of limitations is not tolled during the period that a prisoner could, but does not, file a motion for reconsideration of a state supreme court's ruling." *Id.* at 15a. Analyzing the text of Section 2244(d)(2), the district court reasoned that, "[o]nce the Michigan Supreme Court denied [petitioner's] application for leave to appeal, there was no longer a 'properly filed application' for relief 'pending' before it." *Id.* at 14a. In holding that petitioner was not entitled to tolling for the disputed time period, the district court recognized that the Sixth Circuit had not decided the question and that other courts of appeals had reached differing conclusions. *Id.* at 14a, 15a (citing *Saunders* v. *Senkowski*, 587 F.3d 543, 549 (2d Cir. 2009), cert. denied, 562 U.S. 1169 (2011), and *Serrano* v. *Williams*, 383 F.3d 1181, 1185 (10th Cir. 2004)).

Based on its holding that petitioner was not entitled to tolling for the disputed time period, the district court determined that petitioner's habeas petition was untimely, and dismissed the petition. App., *infra*, 14a, 16a. Because the Sixth Circuit had not decided the tolling question, however, the district court granted a certificate of appealability. *Id.* at 16a, 17a.

5. The court of appeals affirmed. App., *infra*, 1a-7a. It held that, because petitioner ultimately did not seek reconsideration from the Michigan Supreme Court, "the limitation period resumed running the day after the Michigan Supreme Court upheld the denial of [petitioner's] request for leave to appeal." *Id.* at 3a.

The court of appeals reasoned that Section 2244(d)(2) "burdens the petitioner with the responsibility of preserving a 'pending' status of review by appealing (or, as was the case here, moving for reconsideration of) an otherwise final state-court order." App., *infra*, 5a. The statute, the court continued, "instructs [a petitioner] on how to do so": namely, by "'properly fil[ing]' an application for review." *Ibid.* According to the court of appeals, "[i]f [petitioner] had resuscitated his petition by seeking reconsideration, the limitation period would have been tolled because an application for state review would still have been pending." *Id.* at 4a. But because "[petitioner] did not move for reconsideration," the Michigan Supreme Court's order denying his application for leave to appeal "was a final judgment when it issued on March 8, 2011, after which his application for review was no longer pending." *Id.* at 6a.

The court of appeals acknowledged that, in holding that petitioner was not entitled to tolling for the time that he could have sought further review of the denial of his application for state post-conviction relief, it was deepening a circuit conflict, with seven circuits having held that tolling was available in those circumstances and only two having held that it was not. App., *infra*, 6a. The court of appeals cited two reasons for adopting the minority interpretation of Section 2244(d)(2). *First*, the court of appeals contended that "most" of the circuits adopting the majority interpretation had "rel[ied] on precedents that predate" this Court's recent decisions on

the operation of Section 2244(d)(2). *Ibid.* *Second*, the court of appeals stated, without elaboration, that it was "not persuaded by the argument that, absent a challenge to a final court order, a properly filed application is pending 'until there is no other avenue the prisoner could pursue.'" *Ibid.* (quoting *Cramer* v. *Secretary, Department of Corrections*, 461 F.3d 1380, 1383 (11th Cir. 2006)).

Like the district court, therefore, the court of appeals determined that petitioner's habeas petition was untimely, and it affirmed the dismissal of the petition. App., *infra*, 6a, 7a.

6. The court of appeals subsequently denied rehearing. App., *infra*, 8a-9a.

REASONS FOR GRANTING THE PETITION

This case presents a straightforward and mature conflict among the courts of appeals on an important and frequently recurring question of statutory interpretation. In the decision below, the Sixth Circuit expressly recognized that it was deepening an existing conflict on the question whether AEDPA's limitations period is tolled for the time that a federal habeas petitioner could seek further review in state court of the denial of an application for state post-conviction relief, regardless of whether the petitioner ultimately does so. All of the regional circuits except the District of Columbia Circuit have spoken to the issue in some fashion. Seven circuits have held that a petitioner is entitled to tolling until further review is unavailable under the procedures of the convicting State; another circuit has suggested that it would reach the same conclusion; and three circuits, including the Sixth Circuit in the decision below, have held that a petitioner is not entitled to tolling if the petitioner ultimately does not seek further review.

It is rare that the Court encounters so deep and clear a conflict, and the conflict warrants the Court's review in this case. The question presented is of substantial legal and practical importance. The resolution of the question presented will determine whether petitioner is entitled to proceed with his first federal habeas petition and to challenge his conviction and life sentence, or is instead time-barred. And the resolution of the question will have similar consequences for other cases, where habeas petitioners are often proceeding pro se and face severe consequences for late filings by virtue of AEDPA's restrictions on second or successive petitions. This case, moreover, is an optimal vehicle for consideration of the question presented. That question is fully preserved and dispositive here; the facts of this case are typical of the cases in the circuit conflict; and there is little room for the law to develop further, in light of the extensive consideration the question has already received in the courts of appeals. Because this case readily satisfies the criteria for certiorari, the petition should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The Sixth Circuit's decision deepens a conflict among the courts of appeals concerning whether AEDPA's limitations period is tolled for the time that a federal habeas petitioner could seek further review in state court of the denial of an application for state post-conviction relief, regardless of whether the petitioner ultimately does so. In the decision below, the Sixth Circuit expressly recognized that conflict, see App., *infra*, 6a, and other courts of appeals have done the same, see *Saunders* v. *Senkowski*, 587 F.3d 543, 549 (2d Cir. 2009), cert. denied, 562 U.S. 1169 (2011); *Streu* v. *Dormire*, 557 F.3d 960, 963 (8th Cir. 2009); *Jones* v. *Hulick*, 449 F.3d 784, 789 (7th

Cir. 2006), cert. denied, 549 U.S. 1121 (2007). That deep and widely acknowledged conflict warrants the Court's resolution.

1. As the Sixth Circuit correctly noted, see App., *infra*, 6a, seven courts of appeals have held that Section 2244(d)(2) tolls the one-year limitations period until further review is unavailable under the procedures of the convicting State.

In the earliest of the cited decisions, *Taylor* v. *Lee*, 186 F.3d 557 (1999), cert. denied, 528 U.S. 1197 (2000), the Fourth Circuit concluded that "the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest state court (whether decision on the merits, denial of certiorari, or *expiration of the period of time to seek further appellate review*), is tolled from the limitations period for federal habeas corpus petitioners." *Id.* at 561 (emphasis added). That was so, the court explained, because state courts should have "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Ibid.* (quoting *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 845 (1999)). Applying that logic, the Fourth Circuit determined that the petitioner's habeas petition was timely because the AEDPA limitations period was tolled for the time between the denial of an application for state post-conviction relief and the filing of a timely notice of appeal to a higher state court. *Ibid.*

The Third Circuit reached a similar conclusion in *Swartz* v. *Meyers*, 204 F.3d 417 (2000). Citing *Taylor*, it held that an application for state post-conviction relief was pending during "the time for seeking discretionary review, whether or not discretionary review is sought." *Id.* at 420-421. The court's analysis began with the common usage of the word "pending," which it took to en-

compass an entire action "from its inception until the rendition of *final judgment*." *Id.* at 421 (quoting *Black's Law Dictionary* 1134 (6th ed. 1990)). The court noted that, in the context of Section 2244(d)(1), it had concluded in a previous case that "a judgment becomes final after the time for seeking discretionary review expires, even when discretionary review is not sought." *Ibid.* Extending that logic to the context of Section 2244(d)(2), the court determined that the petitioner's federal habeas petition was timely because the limitations period did not run during the time that he could have sought, but did not seek, discretionary review from the highest state court. See *ibid.*

The Fifth Circuit followed suit in *Williams* v. *Cain*, 217 F.3d 303 (2000). Approvingly citing *Taylor* and expressly adopting the reasoning of *Swartz*, the Fifth Circuit concluded that Section 2244(d)(2) tolls AEDPA's limitations period until "further appellate review is unavailable." *Id.* at 310 (citation omitted). Applying that principle in *Melancon* v. *Kaylo*, 259 F.3d 401 (2001), the Fifth Circuit held that AEDPA's limitations period is tolled until "the state limitations period expire[s] [and] a petitioner is not entitled to further appellate review." *Id.* at 407. As a result, the petitioner's federal habeas application was untimely, because he was not entitled to tolling for the time he waited *after* the deadline to appeal the denial of his application for state post-conviction relief. *Ibid.*

The First Circuit joined its sister circuits in *Currie* v. *Matesanz*, 281 F.3d 261 (2002). Citing the same dictionary definition of "pending" as the Third Circuit did in *Swartz*, the First Circuit concluded that "an application for post-conviction relief is pending from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's proce-

dures." *Id.* at 263 (internal quotation marks and citation omitted). That result, the court noted, was consistent with the common understanding of when an action is "pending." See *id.* at 266. Applying that rule, the First Circuit determined that the petitioner's application for state post-conviction relief was "pending" for the time between the denial of his application and his motion for leave to appeal to a single justice of the highest state court. See *id.* at 263, 272.

The Eighth Circuit adopted the majority interpretation soon after in *Williams* v. *Bruton*, 299 F.3d 981 (2002). It held that AEDPA's limitations period stopped running for the time that the petitioner could have appealed from the denial of his application for state post-conviction relief, even though he ultimately did not do so. See *id.* at 984. The Eighth Circuit relied in part on this Court's then-recent decision in *Carey* v. *Saffold*, 536 U.S. 214 (2002), which held that the term "pending" in Section 2244(d)(2) covered the time between a lower state court's decision and the filing of a notice of appeal to a higher state court. The Eighth Circuit quoted *Saffold* for the proposition that "[a]n application is pending as long as the ordinary state collateral review process is in continuance—*i.e.*, until the completion of that process." 299 F.3d at 983 (internal quotation marks omitted) (quoting *Saffold*, 536 U.S. at 219-220). From that premise, the court reasoned that the petitioner's application for state post-conviction relief remained "pending" up to the point at which "it was too late for him to appeal"; until then, "the possibility remained that [the petitioner] would appeal and that the appellate court would order the lower court to grant the application." *Ibid.*

The Tenth Circuit reached a similar conclusion in *Serrano* v. *Williams*, 383 F.3d 1181 (2004). Citing circuit precedent, the court held that, "regardless of whether a

petitioner actually appeals a denial of a post-conviction application, the limitations period is tolled during the period in which the petitioner *could have* sought an appeal under state law." *Id.* at 1184. Like the Eighth Circuit, the Tenth Circuit noted that its holding was consistent with *Saffold*, because it allowed prisoners to pursue relief "seriatim down [state and federal] post-conviction tracks," thus promoting the values of "comity, finality, and federalism." *Id.* at 1186 n.5. In the petitioner's case, the court continued, "[state] law and rules of appellate procedure do not preclude the filing of a motion for rehearing with [the highest state court] to reconsider the denial of a certiorari writ." *Id.* at 1185. As a result, "[the petitioner's] AEDPA limitations period would be tolled" during the time that he could have sought reconsideration, "even though he did not pursue" that relief, and the petition was therefore timely. *Ibid.*

Finally, the Eleventh Circuit followed suit in *Cramer* v. *Secretary, Department of Corrections*, 461 F.3d 1380 (2006). Like the Eighth and Tenth Circuits, the Eleventh Circuit started with this Court's decision in *Saffold*, relying on its statement that an application for state post-conviction relief remains pending "[u]ntil the application has achieved final resolution through the State's post-conviction procedures." *Id.* at 1383 (quoting *Saffold*, 536 U.S. at 220). The Eleventh Circuit noted that this Court's then-recent decision in *Evans* v. *Chavis*, 546 U.S. 189 (2006), reiterated that proposition. See 461 F.3d at 1383. The Eleventh Circuit explained that "[n]othing in the caselaw dictates that the appeal must be taken for the claim to remain pending." *Ibid.* The court added that "logic dictates that the claim is pending regardless of whether the inmate actually files the notice of appeal," because the word "pending" "refers to the continuation of the process, or the time until the process

is completed." *Ibid.* "The process is not complete," the court concluded, "until there is no other avenue the prisoner could pursue." *Ibid.* Based on that reasoning, the court determined that the petitioner was entitled to tolling for "the time in which [he] could have filed an appeal from the denial of his motion to correct sentence," even if he did not in fact do so. *Id.* at 1384; see *Nix* v. *Secretary for the Department of Corrections*, 393 F.3d 1235, 1237 (11th Cir. 2004) (reversing the dismissal of a habeas petition as untimely on the ground that the district court did not toll the limitations period during "the time in which [the petitioner] could have filed a motion for rehearing of the denial of his motion to correct illegal sentence").

2. In addition to the foregoing circuits, the Ninth Circuit has suggested that it would follow the majority approach. In *Hemmerle* v. *Schriro*, 495 F.3d 1069 (2007), cert. denied, 555 U.S. 829 (2008), the Ninth Circuit considered whether the denial of discretionary review by a highest state court was final when the court released its decision, or instead when the clerk sent the record back to the trial court. See *id.* at 1077. The court held that the former was correct. See *ibid.* In so holding, the Ninth Circuit began from *Saffold*'s premise that "an application for state collateral review is pending as long as the ordinary state collateral review process is in continuance—*i.e.*, until the completion of that process." *Ibid.* (internal quotation marks omitted) (quoting *Saffold*, 536 U.S. at 219-220). The Ninth Circuit then explained that the return of the record to the trial court was merely the "performance of a ministerial function"; once the highest state court denied review, "[t]here was nothing left for it to do," and the AEDPA limitations period resumed running. *Ibid.*; cf. Ariz. R. Crim. P. 31.18(e) (providing that, "[u]nless permitted by specific order, no party shall file a motion for reconsideration of * * * an order denying a

petition for review"). The Ninth Circuit's holding is consistent with the majority position that an application for state post-conviction review is pending "until there is no other avenue the prisoner could pursue." *Cramer*, 461 F.3d at 1383.

3. In addition to the Sixth Circuit in the decision below, only two courts of appeals have adopted the contrary interpretation.

In *Saunders*, *supra*, the Second Circuit held that "the one-year AEDPA limitations period is not tolled by the thirty-day period in which the petitioner could have filed, but did not file, a motion for reconsideration." 587 F.3d at 549. In so holding, the Second Circuit relied on prior circuit precedent that "suggest[ed], but [did] not expressly hold, that the post-conviction motion would not be considered 'pending'" during the time that a petitioner could have sought, but did not seek, reconsideration. *Ibid.* Although *Saunders* postdated this Court's recent decisions on the operation of Section 2244(d)(2), the Second Circuit did not cite any of those decisions in support of its holding.

The only other decision the Sixth Circuit cited on its side of the conflict was *Simms* v. *Acevedo*, 595 F.3d 774 (7th Cir. 2010), cert. denied, 562 U.S. 1134 (2011). In *Simms*, the Seventh Circuit, like the Second Circuit, did not mention any of this Court's recent decisions on the operation of Section 2244(d)(2). Instead, relying on prior circuit precedent, it concluded that, "in Illinois, the time period during which a petition for reconsideration can be filed after the denial of a petition for leave to appeal is not tolled for purposes of AEDPA." *Id.* at 781. Applying that rule, the Seventh Circuit affirmed the district court's dismissal of the petitioner's federal habeas petition. *Ibid.*; see *Wilson* v. *Battles*, 302 F.3d 745, 748 (7th Cir. 2002) (holding that the ability to seek reconsidera-

tion under Illinois law "has no bearing on AEDPA's one-year statute of limitations").

4. In the decision below, the Sixth Circuit expressly acknowledged the circuit conflict. See App., *infra*, 6a. But it sought to minimize that conflict on the ground that "most" of the circuits adopting the majority interpretation had "rel[ied] on precedents that predate" this Court's recent decisions on the operation of Section 2244(d)(2)—specifically, *Saffold*, *supra*; *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005); *Evans*, *supra*; and *Lawrence* v. *Florida*, 549 U.S. 327 (2007). App., *infra*, 6a. That contention does not withstand scrutiny.

a. To begin with, of the decisions discussed above in which courts of appeals initially adopted the majority interpretation, several do rely on this Court's recent decisions: in particular, on the most relevant of those decisions, *Saffold*, which held that the term "pending" in Section 2244(d)(2) covered the time between a lower state court's decision and the filing of a notice of appeal. See *Cramer*, 461 F.3d at 1382; *Serrano*, 383 F.3d at 1186 n.5; *Williams*, 299 F.3d at 983.

b. In addition, after initially adopting the majority interpretation, several courts of appeals have issued subsequent decisions addressing this Court's recent decisions. In *Streu*, *supra*, the Eighth Circuit reaffirmed its holding from *Williams* that a petitioner's application for state post-conviction relief remained "pending" up to the point at which it was too late for him to appeal: specifically, until the last day on which the petitioner could have filed a notice of appeal, even though he ultimately did not do so. 557 F.3d at 966. In so doing, the Eighth Circuit relied on this Court's observation in *Saffold* that an application for state post-conviction relief "remains 'pending'" "until the application has achieved final resolution through the State's post-conviction procedures."

Ibid. (citing *Saffold*, 536 U.S. at 220). The Eighth Circuit concluded that "[the petitioner's] motion to reopen was 'pending'" from "the date on which he filed the motion [to reopen] in the [trial] court" until "the date on which the time for filing a notice of appeal from the [trial] court's denial of the motion expired." *Ibid.*

Drew v. *MacEachern*, 620 F.3d 16 (1st Cir. 2010), is to the same effect. In *Drew*, the First Circuit ultimately followed its earlier decision in *Currie*. See 620 F.3d at 21. The First Circuit began its analysis, however, by discussing this Court's decision in *Saffold*. It reiterated the now-familiar principle from *Saffold* that "[a]n application is pending as long as the ordinary state collateral review process is in continuance—*i.e.*, until the completion of that process." *Id.* at 20 (quoting *Saffold*, 536 U.S. at 219-220 (internal quotation marks omitted)). Because "further appellate review was unavailable under Massachusetts's procedures" after a single justice of the highest state court denied the petitioner's application for leave to appeal, the petitioner's application for state post-conviction relief was no longer pending, and his federal habeas petition was therefore time-barred. *Id.* at 22 (alteration omitted).

By the same token, in *Watts* v. *Brewer*, 416 Fed. Appx. 425 (2011), the Fifth Circuit reiterated that AEDPA's limitations period is tolled until a state court could take no further action on an application for post-conviction relief—in that case, the date on which the highest state court issued its mandate denying review. *Id.* at 430. Notably, the Fifth Circuit addressed not only *Saffold*, but also *Lawrence*, which held that Section 2244(d)(2) provided for tolling only for the time that an application for post-conviction relief is "pending" in state court (and not for the time that a subsequent petition for certiorari is pending before this Court). The Fifth Cir-

cuit explained that *Lawrence* confirmed its understanding of AEDPA's tolling provision, because this Court observed that "[s]tate review ends when the state courts have finally resolved an application for state post-conviction relief": that is, when "no other state avenues for relief remain open." *Ibid.* (emphasis omitted) (quoting *Lawrence*, 549 U.S. at 332). The Fifth Circuit explained that, in the relevant jurisdiction, "state appellate review becomes final on the date the mandate is issued"; up to that point, the highest state court "may grant a rehearing or stay the mandate pending further review." *Id.* at 429. The Fifth Circuit thus determined that the petitioner's state post-conviction proceeding did not become final until the highest state court issued its mandate, even though the petitioner sought no relief after the denial of his appeal and before the issuance of the mandate. *Id.* at 430.[3]

5. As matters currently stand, therefore, AEDPA's limitations period is tolled until further review is unavailable in the First, Third, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits; it would likely be tolled in the Ninth Circuit; and it is not tolled in the Second, Sixth, and Seventh Circuits. Given the depth and persistence of the circuit conflict, there is no colorable argument that the conflict will somehow resolve itself without

[3] The Sixth Circuit cited three other decisions in its opinion, see App., *infra*, 6a, but those decisions are inapposite to the question presented here. Two of those decisions addressed the question whether an application for state post-conviction relief was "properly filed" for purposes of Section 2244(d)(2), see *Jenkins* v. *Superintendent of Laurel Highlands*, 705 F.3d 80, 85-88 (3d Cir. 2013); *Escalante* v. *Watson*, 488 Fed. Appx. 694, 696-701 (4th Cir. 2012), cert. denied, 133 S. Ct. 951 (2013), and the third addressed only the question whether the petitioner was entitled to equitable tolling, see *Santini* v. *Clements*, 498 Fed. Appx. 807, 809-810 (10th Cir. 2012).

this Court's intervention. With such an entrenched conflict on a question of statutory interpretation, this is a paradigmatic case requiring the Court's review.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. This Court's review is especially warranted because the question presented in this case is one of substantial legal and practical importance.

This Court needs little reminding that, since AEDPA's enactment two decades ago, it has granted certiorari in an enormous number of cases concerning the operation of AEDPA's statutes of limitations for federal and state prisoners alike. See, *e.g.*, *McQuiggin* v. *Perkins*, 133 S. Ct. 1924 (2013); *Wood* v. *Milyard*, 132 S. Ct. 1826 (2012); *Gonzalez* v. *Thaler*, 132 S. Ct. 641 (2012); *Holland* v. *Florida*, 560 U.S. 631 (2010); *Jimenez* v. *Quarterman*, 555 U.S. 113 (2009); *Day* v. *McDonough*, 547 U.S. 198 (2006); *Mayle* v. *Felix*, 545 U.S. 644 (2005); *Dodd* v. *United States*, 545 U.S. 353 (2005); *Johnson* v. *United States*, 544 U.S. 295 (2005); *Clay* v. *United States*, 537 U.S. 522 (2003). And a significant number of those cases have involved the operation of Section 2244(d)(2), the very provision at issue here. See *Wall* v. *Kholi*, 562 U.S. 545 (2011); *Allen* v. *Siebert*, 552 U.S. 3 (2007); *Lawrence*, *supra*; *Evans*, *supra*; *Pace*, *supra*; *Saffold*, *supra*; *Duncan* v. *Walker*, 533 U.S. 167 (2001); *Artuz* v. *Bennett*, 531 U.S. 4 (2000).

The Court's solicitude for cases presenting AEDPA limitations issues is hardly surprising. To begin with, "[p]redictability [is] a primary goal of statutes of limitations." *Owens* v. *Okure*, 488 U.S. 235, 240 (1989). Granting certiorari on questions concerning the interpretation of statutes of limitations promotes predictability by bringing clarity and uniformity to their operation.

Such predictability, moreover, is particularly important in the context of AEDPA, which governs the ability of prisoners to obtain collateral review in federal court of their criminal convictions. Habeas petitions make up a sizable portion of the federal judiciary's overall docket: habeas petitions filed by state prisoners alone account for approximately 5.6% of all civil cases in the federal system nationwide—over 16,000 cases a year. See United States Courts, *Judicial Facts and Figures 2014*, tbls. 4.4 & 4.6 (Sept. 30, 2014) <tinyurl.com/factsandfigures2014> (*Judicial Facts and Figures*).

Under AEDPA, moreover, the consequences of the untimely filing of a habeas petition are severe. If a state prisoner misses the filing deadline, his petition will be dismissed as time-barred, and any future habeas petition would be second or successive, ordinarily resulting in dismissal. See 28 U.S.C. 2244(b). The need for clarity in the operation of AEDPA's statute of limitations is especially acute because the overwhelming majority of federal habeas petitioners challenging state convictions are proceeding pro se. See *Judicial Facts and Figures*, tbls. 2.3 & 2.4. This case well illustrates the stakes: the resolution of the question presented will determine whether petitioner, who proceeded pro se below, is entitled to pursue his first federal habeas petition challenging his conviction and life sentence.

2. In addition, this case is an ideal vehicle for consideration and resolution of the question presented. That question was obviously pressed and passed upon below. As with many of the cases in the circuit conflict, this case presents the question in the context of a prisoner who could have sought reconsideration of the denial of review by the highest state court, but ultimately did not do so.

See, *e.g.*, *Simms*, 595 F.3d at 781; *Saunders*, 587 F.3d at 549; *Nix*, 393 F.3d at 1237; *Serrano*, 383 F.3d at 1184.[4] And this case presents the question cleanly and squarely: it is undisputed that petitioner's federal habeas petition would be timely if the question were resolved in his favor, and the court of appeals cited no other ground for dismissing petitioner's federal habeas petition besides untimeliness.

Finally, allowing further percolation in the lower courts would be pointless, because all of the regional circuits except the District of Columbia Circuit have addressed the question presented in some fashion. The numerous opinions of those circuits contain substantial analysis and comprehensively set out the arguments on both sides of the conflict. And as discussed above, many of those opinions have specifically addressed this Court's recent decisions on the operation of Section 2244(d)(2). See App., *infra*, 4a-6a; pp. 17-19, *supra*. The likelihood of meaningful further development in the law on the question presented, let alone resolution of the deeply entrenched circuit conflict, is therefore slim—especially given the limitations on appellate review in AEDPA. See 28 U.S.C. 2253(c).

In sum, the Sixth Circuit's decision deepens a widely recognized conflict on the question whether AEDPA's

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[4] The Michigan Supreme Court does not simply deny motions for reconsideration as a matter of course; it has often granted reconsideration and reversed its denials of leave to appeal criminal convictions. See, *e.g.*, *People* v. *Adams*, 788 N.W.2d 18 (2010); *People* v. *Cron*, 742 N.W.2d 126 (2007); *People* v. *Chavis*, 643 N.W.2d 578 (2002); *People* v. *Beard*, 570 N.W.2d 262 (1997); *People* v. *Edmunson*, 554 N.W.2d 575 (1996); *People* v. *Khoury*, 467 N.W.2d 810 (1991); *People* v. *Wright*, 485 N.W.2d 559 (1992); *People* v. *Paulus*, 338 N.W.2d 188 (1983); *People* v. *Williams*, 327 N.W.2d 315 (1982).

limitations period is tolled for the time that a federal habeas petitioner could seek further review in state court of the denial of an application for state post-conviction relief, regardless of whether the petitioner ultimately does so. That question is an undeniably important and recurring one, and this case constitutes an ideal vehicle for consideration of the question. The Court should therefore grant the petition for certiorari and resolve the conflict on one of the last major questions concerning the limitations period for federal habeas petitions under AEDPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2016

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-2364

Marlon Scarber, Petitioner-Appellant

v.

Carmen Denise Palmer, Warden, Respondent-Appellee

December 22, 2015

Before: BOGGS and McKEAGUE, Circuit Judges; and BERTELSMAN, District Judge.[*]

OPINION

BOGGS, Circuit Judge.

Marlon Scarber appeals the district court's judgment dismissing as untimely his petition for a writ of habeas corpus. He argues that the statute of limitations provided in the Antiterrorism and Effective Death Penalty Act (AEDPA) was tolled for two three-week periods when he could have filed motions for reconsideration of adverse Michigan Supreme Court orders. We hold that the statute ran during those periods when Scarber had the op-

[*] The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

portunity to, but did not, move for reconsideration, and we therefore affirm.

In 2006, Scarber was sentenced to life imprisonment and the Michigan Court of Appeals affirmed. *People v. King*, Nos. 273443, 273543, 273955, 2007 WL 4209366 (Mich. Ct. App. Nov. 29, 2007) (per curiam). The Michigan Supreme Court denied his application for leave to appeal. *People v. Taylor*, 759 N.W.2d 361 (Mich. 2008). On November 12, 2009, Scarber filed a motion to dismiss the charges against him for lack of jurisdiction, which the court took as a post-conviction motion for relief. *See* Mich. Ct. R. 6.500 *et seq*. The trial court denied the motion, the Michigan Court of Appeals affirmed, and on March 8, 2011, the Michigan Supreme Court denied his application for leave to appeal that decision. *People v. Scarber*, 794 N.W.2d 581 (Mich. 2011). On August 4, 2011, he filed a state habeas petition that was ultimately unsuccessful. *See People v. Scarber*, 839 N.W.2d 481 (Mich. 2013).

Soon thereafter, Scarber filed a federal habeas petition. The district court dismissed it as untimely but granted a certificate of appealability on the issue of whether AEDPA's statute of limitations was tolled during the three-week period when he could have moved for reconsideration of the rejection of his application for leave to appeal the denial of his motion to dismiss. We review de novo the dismissal of a habeas petition as barred by AEDPA's statute of limitations. *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th Cir. 2011).

This case has three inflection points: when AEDPA's statute of limitations began to run (March 20, 2009), when it was tolled (November 12, 2009), and when it started up again (subject to debate). The limitation peri-

od began to run on March 20, 2009, after the ninety days when Scarber could have sought review of the merits judgment against him with the United States Supreme Court. *See Bronaugh v. Ohio*, 235 F.3d 280, 285 (6th Cir. 2000). The limitation period is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). It was tolled with 128 days remaining from November 12, 2009 (when Scarber filed the motion to dismiss) until March 8, 2011 (when the Michigan Supreme Court rejected his request to appeal its denial). According to the district court, the limitation period resumed running the next day and expired on July 15, 2011. By Scarber's counting, it was tolled for the next three weeks, during which time he could have filed a motion to reconsider as well as for the same period after the Michigan Supreme Court denied review of his August 2011 petition. *See* Mich. Ct. R. 7.311(G).

We hold that the limitation period resumed running the day after the Michigan Supreme Court upheld the denial of Scarber's request for leave to appeal. AEDPA's limitation period begins to run after "the expiration of *the time for seeking* [direct review]." § 2244(d)(1)(A) (emphasis added). In contrast, it is tolled when "a properly filed application for State postconviction or other collateral review . . . is *pending*." § 2244(d)(2) (emphasis added). "The linguistic difference is not insignificant." *Lawrence v. Florida*, 549 U.S. 327, 334 (2007). Congress instructed that the limitation period commences only after "the time for seeking" direct review has expired. That language covers situations where a defendant may, but does not, petition for certiorari. *Id.* at 333. Such was the case here. Congress was less forgiving when it came to tolling during collateral review, requir-

ing a "properly filed application" to be "pending" before the state court. Such was not the case here. If Scarber had resuscitated his petition by seeking reconsideration, the limitation period would have been tolled because an application for state review would still have been pending. *See Sherwood v. Prelesnik*, 579 F.3d 581, 587 (6th Cir. 2009) (petitioner "actually filed a timely motion for reconsideration"). However, the AEDPA limitation period does not stop running for a petitioner who had the opportunity to, but did not, file a motion for reconsideration.

We have in dicta and an unpublished order reached the opposite conclusion. *See Martin v. Wilson*, 110 F. App'x 488, 490 (6th Cir. 2004); *Abela v. Martin*, 348 F.3d 164, 171–73 (6th Cir. 2003) (en banc), overruled in part by *Lawrence v. Florida*, 549 U.S. 327 (2007). Of course, neither dicta nor an unpublished decision is binding precedent. *See United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007); *Asmo v. Keane, Inc.*, 471 F.3d 588, 600 (6th Cir. 2006). But more to the point, those rulings did not have the benefit of later Supreme Court opinions that provided additional clarity regarding the meaning of "pending" in § 2244(d)(2). In *Evans v. Chavis*, the Court reiterated its holding from *Carey v. Saffold*: a claim is "pending" during the time between an adverse lower-court determination and "the prisoner's filing of a notice of appeal," but only if "the filing of the appeal is timely." 546 U.S. 189, 191 (2006) (citing *Carey*, 536 U.S. 214 (2002)). By negative implication, the period between an adverse lower-court decision and an untimely appeal does count toward the AEDPA limitation period. And by the same logic, if no timely petition for rehearing is filed, the limitation period runs from after the date when a state's highest court denies collateral relief. Just as "a state prisoner c[annot] toll the statute of limitations at

will simply by filing *untimely* state postconviction petitions," *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005), he cannot do so by sitting on his hands.

Then in *Lawrence v. Florida*, the Court held that "[w]hen the state courts have issued a *final judgment* on a state application, it is no longer pending." 549 U.S. 327, 334 (2007) (emphasis added). In so doing, the Court overruled *Abela* in pertinent part, as recognized in Hall, 662 F.3d at 753, thereby undercutting *Martin*'s reliance on *Abela*, *see* 110 F. App'x at 491. Review of Scarber's post-conviction motion ended when the Michigan Supreme Court issued a final order denying his application for leave to appeal—but only because he had appealed the intermediate court's earlier final order. *See* Mich. Ct. R. 7.202(6)(a)(i) (defining "final order" and "final judgment" as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order").

Section § 2244(d)(2) burdens the petitioner with the responsibility of preserving a "pending" status of review by appealing (or, as was the case here, moving for reconsideration of) an otherwise final state-court order. Its language instructs on how to do so: "properly fili[ing]" an application for review. The requirement of a properly filed application is not undermined by the Court's earlier holding that a collateral-review application is pending until it "has achieved final resolution through the State's post-conviction procedures." *Carey*, 536 U.S. at 220. In *Carey*, it was the petitioner's "timely filing of a notice of appeal"—not the expiration of the time for seeking appellate review—that rendered California's collateral-review process incomplete (and the application for review, therefore, "pending"). *Id.* at 219. Scarber chose a

different path. Since Scarber did not move for reconsideration, the Michigan Supreme Court's order was a final judgment when it issued on March 8, 2011, after which his application for review was no longer pending.

Several of our sister circuits agree. *See Simms v. Acevedo*, 595 F.3d 774, 781 (7th Cir. 2010); *Saunders v. Senkowski*, 587 F.3d 543, 548 (2d Cir. 2009). Most of those that do not agree rely on precedents that predate the Court's delineations of § 2244(d)(2) in *Pace*, *Carey*, *Evans*, and *Lawrence*. *See, e.g., Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 85 n.4 (3d Cir. 2013) (quoting *Swartz v. Meyers*, 204 F.3d 417, 424 (3d Cir. 2000)); *Santini v. Clements*, 498 F. App'x 807, 809 (10th Cir. 2012) (citing *Serrano v. Williams*, 383 F.3d 1181, 1185 (10th Cir. 2004)); *Escalante v. Watson*, 488 F. App'x 694, 702 (4th Cir. 2012) (Davis, J., dissenting) (quoting *Taylor v. Lee*, 186 F.3d 557, 561 (4th Cir. 1999)); *Drew v. MacEachern*, 620 F.3d 16, 21 (1st Cir. 2010) (quoting *Currie v. Matesanz*, 281 F.3d 261, 263 (1st Cir. 2002)); *Streu v. Dormire*, 557 F.3d 960, 966 (8th Cir. 2009) (citing *Williams v. Bruton*, 299 F.3d 981 (8th Cir. 2002)); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001). And, as discussed above, we are not persuaded by the argument that, absent a challenge to a final court order, a properly filed application is pending "until there is no other avenue the prisoner could pursue." *Cramer v. Sec'y, Dep't of Corr.*, 461 F.3d 1380, 1383 (11th Cir. 2006).

Scarber makes several "alternative arguments" on reply that were not raised in his opening brief. "We have consistently held, however, that arguments made to us for the first time in a reply brief are waived." *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). In any event, they are without merit. The limitation period runs from "the date on which the factual predicate of the claim . . .

could have been discovered," but only if the petitioner through due diligence alleges newly discovered evidence. § 2244(d)(1)(D); *see also McQuiggin v. Per*kins, 133 S. Ct. 1924, 1929 (2013). After it has been tolled, the AEDPA statute-of-limitations clock resumes when a final order issues, not when the court's mandate takes effect or the petitioner receives notice. *Lawrence*, 549 U.S. at 334.

For the foregoing reasons, we AFFIRM the dismissal of Scarber's untimely habeas petition.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-2364

Marlon Scarber, Petitioner-Appellant

v.

Carmen Denise Palmer, Warden, Respondent-Appellee

January 29, 2016

Before: BOGGS and McKEAGUE, Circuit Judges; and BERTELSMAN, District Judge.*

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to

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* The Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

the full[**] court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Deborah S. Hunt, Clerk

[**] Judges Griffin and White recused themselves from participation in this ruling.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 13-cv-15074

Marlon Scarber, Petitioner

v.

Carmen Palmer, Respondent

September 25, 2014

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS, GRANTING CERTIFICATE OF APPEALABILITY, AND DENYING AS MOOT MOTION FOR PRODUCTION
(document no. 8)

Petitioner Marlon Scarber is a state inmate currently incarcerated at the Michigan Reformatory in Ionia, Michigan. In his petition for habeas corpus under 28 U.S.C. § 2254, he challenges his convictions for first-degree premeditated murder, armed robbery, kidnapping, and felony firearm. Palmer, the respondent, has filed an answer in opposition, arguing that the petition was not timely filed, that several of the claims are procedurally defaulted, and that the claims are meritless. The Court concludes that the petition was not timely filed and will dismiss the case.

BACKGROUND

Scarber's convictions arise from the kidnapping and murder of Fate Washington in Detroit in October 2005. Scarber was tried in Wayne County Circuit Court with two co-defendants. The two co-defendants were tried before the same jury and Scarber before a separate jury. Scarber was convicted of first-degree premeditated murder, felony murder, armed robbery, kidnapping, felony firearm, and felon in possession of a firearm. The trial court vacated Scarber's felony murder conviction on double jeopardy grounds and dismissed his felon-in-possession conviction without explanation. Scarber was sentenced to life imprisonment for the first-degree premeditated murder conviction, 38 to 80 years' imprisonment for the armed robbery and kidnapping convictions, and two years' imprisonment for the felony-firearm conviction.

Scarber and his co-defendants each filed an appeal of right in the Michigan Court of Appeals. The Michigan Court of Appeals consolidated the appeals and affirmed Scarber's convictions. *People v. Scarber*, No. 273543, 2007 WL 4209366 (Mich. Ct. App. Nov. 29, 2007). Scarber's application for leave to appeal to the Michigan Supreme Court was also consolidated with the appeals of his co-defendants. The Michigan Supreme Court issued a per curiam opinion granting leave to appeal on an issue raised by a co-defendant and denying leave to appeal on all issues raised by Scarber. *People v. Scarber*, 482 Mich. 368 (Dec. 19, 2008).

On November 12, 2009, Scarber filed a motion to dismiss in the trial court on the ground that the trial court lacked jurisdiction. The trial court denied the motion. *People v. Scarber*, No. 06-003811-02 (Wayne County Cir. Ct. March 2, 2010). Scarber filed an application

for leave to appeal in the Michigan Court of Appeals. The application was denied. *People v. Scarber*, No. 297365 (Mich. Ct. App. July 28, 2010). Scarber's application for leave to appeal in the Michigan Supreme Court was also denied. *People v. Scarber*, 488 Mich. 1046 (Mar. 8, 2011).

Scarber filed a motion for relief from judgment on August 4, 2011, raising claims regarding the denial of a public trial, and ineffective assistance of trial and appellate counsel. The trial court denied the motion. *People v. Scarber*, No. 06-003811-02 (Wayne County Cir. Ct. Feb. 6, 2012). Both Michigan appellate courts denied Scarber's applications for leave to appeal from this denial. *People v. Scarber*, No. 311388 (Mich. Ct. App. Apr. 25, 2013); *People v. Scarber*, 495 Mich. 899 (Mich. Nov. 25, 2013). Scarber filed this habeas petition on December 6, 2013.

DISCUSSION

I. Statute of Limitations

Palmer argues that the petition is barred by the one-year statute of limitations. A prisoner must file a federal habeas corpus petition within one year of the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A) & (D). The conclusion of direct review occurs upon the denial of certiorari by the United States Supreme Court or the expiration of time for seeking a writ of certiorari. *Wall v. Kholi*, 131 S. Ct. 1278, 1282 (March 7, 2011). In addition, the time during which a prisoner seeks state-court collateral review of a convic-

tion does not count toward the limitation period. 28 U.S.C. § 2244(d)(2). A properly filed application for state postconviction relief, while tolling the limitation, does not refresh the limitation period. *Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003).

In the pending case, Scarber appealed his conviction first to the Michigan Court of Appeals, and then to the Michigan Supreme Court. The Michigan Supreme Court denied his application for leave to appeal on December 19, 2008. Scarber had ninety days from that date to file a petition for writ of certiorari with the United States Supreme Court, which he did not do. Thus, his conviction became final on March 19, 2009, when the time period for seeking certiorari expired. *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000) (one-year statute of limitations does not begin to run until the time for filing a petition for a writ of certiorari for direct review in the United States Supreme Court has expired). The last day on which a petitioner can file a petition for a writ of certiorari in the United States Supreme Court is not counted toward the one-year limitations period applicable to habeas corpus petitions. *Id.* at 285. Accordingly, the limitations period commenced on March 20, 2009, and continued to run until Scarber filed a motion to dismiss in the trial court on November 12, 2009. That motion, a properly filed motion for state-court collateral review, tolled the limitations period with 128 days remaining. *See* 28 U.S.C. § 2244(d)(2). The limitations period resumed running on March 9, 2011, the day after the Michigan Supreme Court denied Scarber's application for leave to appeal the denial of his motion to dismiss. The limitations period continued running until it expired on July 15, 2011.

The limitations period was therefore already expired when Scarber filed a motion for relief from judgment in the trial court on August 4, 2011. That motion did not reset or revive the expired limitations period. *Anderson v. Brunsman*, 562 Fed.Appx. 426 at *3 (6th Cir. Apr. 10, 2014) ("[A] post-conviction or collateral proceeding may toll the statute of limitations, but does not restart it.").

Scarber argues that the limitations period should be tolled during the period that he could (but did not) file a motion for reconsideration of the Michigan Supreme Court's order denying his application for leave to appeal. Thus, he contends that the limitations period should be tolled between March 9, 2011 (when the Michigan Supreme Court denied Scarber's application) and March 30 (the last day he could have filed a motion for reconsideration). It would also be tolled from November 25, 2013 (when the Michigan Supreme Court again denied review) until he filed this petition on December 6.

The Sixth Circuit has not decided whether the time period when a defendant could have filed a motion for reconsideration tolls the statute of limitations. For several reasons, the Court holds that it does not.

Section 2244(d)(2) states: "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." Once the Michigan Supreme Court denied Scarber's application for leave to appeal, there was no longer a "properly filed application" for relief "pending" before it. Indeed, there was no motion or application for relief pending in any court. All of the properly filed motions had been resolved—thus, they could not be pending.

By contrast, section 2244(d)(1)(A) states that the limitations period shall not commence until "the date on which the judgment became final by the conclusion of direct review *or the expiration of the time for seeking such review*." (italics added). This section explicitly provides for the situation here—where the defendant could file a motion seeking further review, but doesn't. Section 2244(d)(2) contains no similar provision. Instead, Congress required a "properly filed" motion "pending" before a court—a requirement not present in this case.

Finally, in *Sherwood v. Prelesnik*, 579 F.3d 581 (6th Cir. 2009), a prisoner filed a motion for reconsideration from the Michigan Supreme Court's denial of his application for leave to appeal. The question before the Court was "whether a timely motion for rehearing in a state supreme court on a post-conviction appeal tolls the time for a habeas petition." *Id.* at 583. The Court held that it did, emphasizing that "Sherwood actually filed a timely motion for reconsideration," and the court "thus had a timely filed motion over which it had jurisdiction pending before it." *Id.* at 587. Unlike in *Sherwood*, Scarber never filed a timely motion for reconsideration. The Court therefore holds that the statute of limitations is not tolled during the period that a prisoner could, but does not, file a motion for reconsideration of a state supreme court's ruling. *See also Saunders v. Senkowski,* 587 F.3d 543, 549 (2d Cir. 2009) ("[T]he one-year AEDPA limitation period is not tolled by the thirty-day period in which the petitioner could have filed, but did not file, a motion for reconsideration."); *but see Serrano v. Williams,* 383 F.3d 1181, 1185 (10th Cir. 2004) (holding that fifteen-day window for filing a motion for rehearing after the denial of leave to appeal does toll the AEDPA statute of limitations).

Scarber does not assert a claim for equitable tolling of the limitations period and the Court finds no basis for equitable tolling. The petition is therefore untimely.

II. Certificate of Appealability

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rules Governing § 2254 Cases, Rule 11(a). When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* In such a circumstance, no appeal is warranted. *Id.*

As noted, the Sixth Circuit Court of Appeals has not decided whether the time period when a defendant could have filed a motion for reconsideration tolls the statute of limitations and one circuit court has tolled the limitations period during the time when a petitioner could have filed, but did not file, a motion for rehearing. *See Serrano*, 383 F.3d at 1185. In light of the foregoing, the Court concludes that reasonable jurists could find it debatable

whether this Court was correct in determining that Scarber filed his habeas petition outside of the one-year limitations period. Further, Scarber raised valid claims of constitutional deprivation in his § 2254 application, including claims of ineffective assistance of counsel and denial of the right to a public trial sufficient to warrant a COA.

III. Motion for Production of Transcripts

Scarber filed a motion for the production of transcripts of certain portions of voir dire of his jury trial. Mot. for Production, ECF No. 5. The Court will dismiss the motion as moot.

ORDER

WHEREFORE, it is hereby **ORDERED** that the petition for a writ of habeas corpus is **DENIED**. This case is **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED** as to the decision that the petition is untimely.

IT IS FURTHER ORDERED that Scarber's motion for production of transcripts (document no. 8) is **DENIED AS MOOT**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: September 25, 2014

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on September 25, 2014, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager