No. 15-1174

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent does not dispute that a circuit conflict exists on the 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. Nor does respondent dispute that this case is an ideal vehicle for resolution of that question or that the question is one of substantial legal and practical importance—not least for petitioner, who will be precluded from pursuing his first federal habeas petition challenging his conviction and life sentence if the decision below is allowed to stand.

Instead, respondent places all of her eggs in two flimsy baskets. Respondent argues that only some of the cases in the circuit conflict present the same factual scenario as this case, and further argues that this Court's decision in *Lawrence* v. *Florida*, 549 U.S. 327 (2007), resolved the question presented. But those arguments are transparently unavailing. As to the former argument, in the decision below, the Sixth Circuit expressly identified the same 7-3 circuit conflict as petitioner does here; each of the cases in that conflict involves the same basic legal question, and respondent's purported factual distinction is immaterial. And as to the latter argument, most of the courts of appeals in the conflict have weighed in on the question presented since *Lawrence*, and *Lawrence* did not address, much less resolve, that question.

Put simply, respondent offers no valid reason why this Court should allow a mature circuit conflict to fester on such an obviously important question—one of the last major outstanding questions concerning the limitations period for federal habeas petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Because this case readily satisfies the criteria for further review, the petition for certiorari should be granted.

1. As the Sixth Circuit correctly recognized in the decision below, see Pet. App. 6a, seven courts of appeals have held that Section 2244(d)(2) tolls AEDPA's one-year limitations period until further review is unavailable under the procedures of the convicting State. See Pet. 11-15. One additional court of appeals has suggested it would follow the majority rule, see Pet. 15-16, and three courts of appeals have adopted the contrary rule, see Pet. 16-17. Although respondent acknowledges that the conflict exists, she insists that this case does not warrant review. Respondent's arguments lack merit.

a. Respondent primarily argues that the circuit conflict is not as deep as it might appear because only a subset of the cases in the conflict are ones in which the petitioner seeks tolling for the time during which he could have filed, but did not file, a motion for reconsideration or rehearing (as opposed to cases in which the petitioner could have filed, but did not file, a notice of appeal). See Br. in Opp. 11-16. That is a distinction without a difference.

i. Respondent's proffered distinction between motions for reconsideration and appeals seemingly hinges on the assertion that the tolling provision in 28 U.S.C. 2244(d)(2) exists only to "allow a habeas petitioner to meet his obligation under [Section] 2254(c) of exhausting his claims in state court." Br. in Opp. 11. But that assertion cannot be reconciled with the text of Section 2244(d)(2), which simply provides for tolling during the time that "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).

This Court's decisions confirm that tolling under Section 2244(d)(2) is broader than, and not somehow coterminous with, exhaustion under Section 2254(c). In *Artuz* v. *Bennett*, 531 U.S. 4 (2000), the Court held that an application for state post-conviction relief could be "properly filed" under Section 2244(d)(2), and thus toll the limitations period, even though the claim at issue had previously been raised on direct appeal and thus was res judicata under state law. See *id.* at 7. Indeed, the Court has held that a petitioner need not raise a claim in an application for state post-conviction relief at all, but instead need only raise the claim on direct appeal, in order to satisfy the exhaustion requirement. See *Castille* v. *Peoples*, 489 U.S. 346, 349 (1989). And lower courts have

consistently held that Section 2244(d)(2) can toll the limitations period during the pendency of a second or successive application for state post-conviction relief, even if that application is not required in order to satisfy the exhaustion requirement. See, *e.g.*, *Jenkins* v. *Johnson*, 330 F.3d 1146, 1153 (9th Cir. 2003); *Smith* v. *Walls*, 276 F.3d 340, 344 (7th Cir. 2002).

Even if a motion for reconsideration is not required for exhaustion purposes, therefore, the inquiry under Section 2244(d)(2) remains the same: does a "properly filed application for state post-conviction * * * review" remain pending during the time that the petitioner could seek further review in state court, regardless of whether the petitioner ultimately does so? For that reason, respondent's proffered distinction between motions for reconsideration and appeals is entirely immaterial.

ii. The Court need not take our word for it; it can take the word of respondent's own counsel. In *Quatrine* v. *Berghuis*, No. 14-1323, 2016 WL 1457878 (6th Cir. Apr. 12, 2016)—issued just after petitioner filed his petition for certiorari—the Sixth Circuit considered whether the reasoning of the decision below applied not just to motions for reconsideration, but also to appeals: specifically, where a habeas petitioner could have sought, but did not seek, leave to appeal the denial of state post-conviction relief. The Sixth Circuit held that it did, concluding that "*Scarber* requires a petitioner to preserve pending status by filing a motion for reconsideration or, in this case, a post-conviction appeal." *Id.* at *3.

Remarkably, the Sixth Circuit did so at the behest of the Michigan Solicitor General—the same counsel representing respondent here. In a letter citing the decision below as supplemental authority, the Michigan Solicitor General urged the Sixth Circuit to "follow its published opinion in *Scarber*" and to conclude that the petitioner's

habeas petition was time-barred on the ground that the petitioner "had the opportunity to, but did not, file the necessary appeal paperwork." Letter to Clerk at 2, *Quatrine*, *supra* (Apr. 4, 2016) (internal quotation marks omitted). And in the decision below here, the Sixth Circuit cited cases from the reconsideration and appeal contexts interchangeably in describing the circuit conflict. See Pet. App. 6a.

Nor is the Sixth Circuit alone in finding the reconsideration-versus-appeal distinction unpersuasive. At least two other courts of appeals have expressly applied the same tolling rule in both the reconsideration and appeal contexts. See *Serrano* v. *Williams*, 383 F.3d 1181, 1185 (10th Cir. 2004) (reconsideration); *Jones* v. *Oklahoma*, 191 Fed. Appx. 752, 754-755 (10th Cir. 2006) (appeal, citing *Serrano*); *Nix* v. *Secretary for the Department of Corrections*, 393 F.3d 1235, 1237 (11th Cir. 2004), cert. denied, 545 U.S. 1114 (2005) (reconsideration); *Cramer* v. *Secretary, Department of Corrections*, 461 F.3d 1380, 1383 & n.5 (11th Cir. 2006) (appeal, citing *Nix*). And like the Sixth Circuit in the decision below, courts have routinely cited cases from the reconsideration and appeal contexts interchangeably in considering tolling issues. See, *e.g.*, *Steen* v. *Schuetzle*, 326 Fed. Appx. 972, 973 (8th Cir. 2009); *Crawford* v. *Smith*, Civ. No. 15-11885, 2016 WL 2894494, at *2 (E.D. Mich. May 18, 2016); *Lynch* v. *Hoffner*, Civ. No. 15-12962, 2016 WL 1622418, at *2 (E.D. Mich. Apr. 22, 2016); *Shaw* v. *Lemke*, Civ. No. 14-2022, 2014 WL 4724434, at *2 (C.D. Ill. Sept. 23, 2014).

iii. Finally on this score, even if respondent were correct that the circuit conflict should be narrowed to cases involving motions for reconsideration, there would still be an ample conflict warranting this Court's review. Out of the cases discussed in the petition, two courts of appeals have held that Section 2244(d)(2) tolls AEDPA's

limitations period for the time that a petitioner could seek reconsideration, regardless of whether the petitioner ultimately does so. See *Nix*, 393 F.3d at 1237; *Serrano*, 383 F.3d at 1185.[1] Three courts of appeals, including the court below, have held the opposite. See Pet. App. 3a; *Simms* v. *Acevedo*, 595 F.3d 774, 781 (7th Cir. 2010), cert. denied, 562 U.S. 1134 (2011); *Saunders* v. *Senkowski*, 587 F.3d 543, 549 (2d Cir. 2009), cert. denied, 562 U.S. 1169 (2011).

This Court, of course, often grants review to decide similarly important questions of federal law where the circuit conflict is much shallower. See, *e.g.*, *Nichols* v. *United States*, 136 S. Ct. 1113, 1117 (2016) (1-1 conflict); *Menominee Indian Tribe of Wisconsin* v. *United States*, 136 S. Ct. 750, 755 (2016) (1-1 conflict). For that reason, respondent's proffered factual distinction should have no bearing on the Court's decision whether to grant review.

b. Respondent further argues that this Court's decision in *Lawrence* "appears to answer" the question presented in this case. See Br. in Opp. 6-10. That is incorrect, and *Lawrence* offers no valid basis for denying review.

i. To begin with, respondent's interpretation of *Lawrence* is manifestly incorrect. *Lawrence* presented the question whether Section 2244(d)(2) tolls AEDPA's limitations period when a petitioner files a petition for certiorari in this Court after losing in post-conviction proceedings in state court. The Court held that it does

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[1] Respondent attempts to distinguish *Serrano* on the ground that the petitioner filed his federal habeas petition during, not after, the period in which he could have sought reconsideration. See Br. in Opp. 15-16. But respondent makes no effort to explain why that distinction is material, and she simply ignores *Nix* altogether.

not, reasoning that "[t]his Court is not a part of a State's post-conviction procedures." 549 U.S. at 332 (internal quotation marks omitted).

Respondent forthrightly acknowledges that "*Lawrence* was not examining the posture of this case." Br. in Opp. 10. Yet respondent latches on to this Court's statement in *Lawrence* that, "[a]fter the State's highest court has issued its mandate or denied review, no other state avenues for relief remain open." 549 U.S. at 332. According to respondent, that statement means that, once a state court "has issued its mandate or denied review," a petitioner has "completed a full round of collateral review," even if *state* law allows the petitioner to seek reconsideration. Br. in Opp. 10.

That argument cannot be reconciled with what this Court actually said in *Lawrence*. In the sentence immediately preceding the one quoted by respondent, the Court observed that "[s]tate review ends when the state courts have finally resolved an application for state post-conviction relief." 549 U.S. at 332. If anything, that statement tends to support *petitioner's* interpretation, because it indicates that tolling ends when a state court could take no further action, with the result that "no other state avenues for relief remain open." *Ibid.* To be sure, in *Lawrence*, that occurred when the highest state court issued its mandate—but only because Florida did not provide any mechanism for additional post-conviction relief. See Fla. R. App. P. 9.330(a), 9.340(a). Here, by contrast, Michigan did provide such a mechanism, in the form of a motion for reconsideration. *Lawrence* certainly does not dictate the conclusion that a habeas petitioner in petitioner's position is not entitled to tolling for the time that he could have sought, but did not seek, reconsideration in state court.

To the extent this Court's prior decisions bear on the question presented here, the most relevant of those decisions is not *Lawrence*, but *Carey* v. *Saffold*, 536 U.S. 214 (2002)—which respondent all but ignores. That case considered a question much closer to the one presented here: namely, whether an application for state post-conviction relief was "pending" for purposes of Section 2244(d)(2) during the time between a lower state court's decision and the filing of a notice of appeal to a higher state court. The Court held that it was, reasoning that "an 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 219-220. "[U]ntil the application has achieved final resolution through the State's post-conviction procedures," the Court explained, "by definition it remains 'pending.'" *Id.* at 220. If any case "answer[s] the question" here, Br. in Opp. 6, it is *Saffold*, not *Lawrence*, because *Saffold* makes clear that an application remains "pending" until the "completion" of the appellate process.

ii. Because *Lawrence* is only tangentially relevant to the question presented here, it is unsurprising that relatively few lower courts have analyzed *Lawrence* in addressing that issue. Since this Court's decision in *Lawrence*, six courts of appeals, including the court below, have considered the question presented. See Pet. App. 3a-7a; *Watts* v. *Brewer*, 416 Fed. Appx. 425, 430 (5th Cir. 2011); *Drew* v. *MacEachern*, 620 F.3d 16, 21 (1st Cir. 2010); *Simms*, 595 F.3d at 781; *Saunders*, 587 F.3d at 549; *Streu* v. *Dormire*, 557 F.3d 960, 966 (8th Cir. 2009). While almost all of those decisions cited *Lawrence* in passing for various propositions, only two actually analyzed *Lawrence* in addressing the question presented

(with those courts drawing differing conclusions). See Pet. App. 5a; *Watts*, 416 Fed. Appx. at 430.[2] As the treatment of *Lawrence* in those decisions confirms, it would thus be entirely pointless to defer resolution of the question presented in light of *Lawrence*; there is no realistic likelihood of further development in the law on the question presented, much less resolution of the deeply entrenched circuit conflict.

2. Finally, perhaps recognizing that petitioner presents a compelling case for further review, respondent contends that, "[o]n the merits," the decision below was correct. See Br. in Opp. 16-18. Specifically, respondent asserts that, because the Michigan Supreme Court's denials of leave to appeal took effect immediately, petitioner's application for post-conviction relief was no longer "pending" when those denials issued, even though petitioner retained the right to move for reconsideration within 21 days. See *id.* at 17.

Respondent's merits argument warrants only a brief response at this stage. As a preliminary matter, by arguing that "a motion [for reconsideration] was never pending" if "the habeas petitioner fail[ed] to file that motion," respondent assumes that "pending" status restarts at each successive stage of state post-conviction review. Br. in Opp. 17. But this Court roundly rejected that assumption in *Saffold*. See 536 U.S. at 221-225.

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[2] By contrast, eight of the ten courts in the circuit conflict discussed *Saffold* in addressing the question presented. See Pet. App. 4a; *Watts*, 416 Fed. Appx. at 427; *Drew*, 620 F.3d at 20-21; *Streu*, 557 F.3d at 966-967; *Cramer* v. *Secretary, Department of Corrections*, 461 F.3d 1380, 1383 (11th Cir. 2006); *Serrano* v. *Williams*, 383 F.3d 1181, 1187 (10th Cir. 2004); *Rouse* v. *Lee*, 339 F.3d 238, 244 (4th Cir. 2003) (en banc), cert. denied, 541 U.S. 905 (2004); *Wilson* v. *Battles*, 302 F.3d 745, 747 (7th Cir. 2002), cert. denied, 538 U.S. 951 (2003).

Beyond that problem, respondent's argument is flatly inconsistent with her effort to draw a distinction between appeals and motions for reconsideration. In Michigan, as elsewhere, the judgment of a trial court denying post-conviction relief has immediate effect, just like an order of the highest state court denying leave to appeal the denial of post-conviction relief. See *Temple* v. *Kelel Distributing Co.*, 454 N.W.2d 610, 611 (Mich. Ct. App. 1990); Mich. Ct. R. 7.209(A)(1), (B)(2).[3] Under respondent's reasoning, an application for post-conviction relief would no longer be "pending" once a trial court denies the application, even though the petitioner retained the right to appeal from that judgment. Yet just a few pages earlier, respondent suggests that the two situations should be analyzed differently. Respondent does not even try to explain why the immediate effect of a state-court order matters with respect to a motion for reconsideration, but not an appeal.

* * * * *

Ultimately, the debate about the merits of the Sixth Circuit's application of Section 2244(d)(2) to petitioner's case is for another day. Respondent does not contend that there is any obstacle to the Court's reaching and resolving the question presented in this case. Nor does respondent suggest that there is anything unique about either the facts of this case or the operation of Michigan law that renders the case a poor vehicle. The Sixth Circuit's decision deepens an expressly and widely recognized conflict on an indisputably important and recurring

[3] Cf. S. Ct. R. 16, 44.2 (similarly providing that this Court's denial of a petition for certiorari takes immediate effect, even though a petitioner may seek rehearing within 25 days).

question of federal law. And that question is of particularly acute importance to petitioner, whose ability to challenge his conviction and life sentence likely rides on whether or not the Court grants his petition for certiorari. The Court should do so and resolve the conflict on the proper interpretation of Section 2244(d)(2).

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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