No. 15-1174

In the Supreme Court of the United States

MARLON SCARBER, PETITIONER

v.

CARMEN DENISE PALMER

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an application for state post-conviction review is still "pending" under 28 U.S.C. § 2244(d)(2) when a state supreme court has denied leave to appeal, that decision has taken effect immediately under state court rules, and the prisoner has not filed any motion for reconsideration.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The petitioner is Marlon Scarber, an inmate. The respondent is Carmen Denise Palmer, a warden of a Michigan state correctional facility.

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OPINIONS BELOW

The petitioner Marlon Scarber has appended the relevant decisions of the federal courts.

JURISDICTION

As noted by Scarber, this Court has jurisdiction over this matter under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d) of Title 28 of the United States Codes provides, in part as follows:

> (d)(1) 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. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > * * *
>
> (2) 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.

INTRODUCTION

Section 2244(d)(2) tolls the one-year window for filing a habeas petition while a petitioner has an application for post-conviction review pending in state court. This tolling provision exists so the petitioner may exhaust his state-court post-conviction remedies.

Here, a habeas petitioner exhausted his state post-conviction remedies by completing a full round of post-conviction review: he presented his claims to a state's trial court, to its intermediate appellate court, and to its highest court. Despite having thus enjoyed a full opportunity to present his claims to the state courts and despite having that time fully tolled, he now argues that he should also receive tolling for the 21 days *after* the state supreme court denied him leave to appeal, a period during which he could have (but did not) file a motion for reconsideration. In his view, his "properly filed" application was still "pending," even though the state-court denial of leave to appeal had immediate effect under state law and even though he did not file a motion for reconsideration.

This case does not present the mature conflict that Scarber asserts. True, a number of circuit courts have addressed tolling for periods during which a petitioner could have filed (but did not file) *an appeal* to a state appellate court. But only a few have addressed this situation, where a petitioner could have filed (but did not file) *a motion for reconsideration* after a state supreme court had considered and rejected an appeal. And the only one that resolved the question in a way that Scarber supports was issued in 2004, three years before this Court issued a decision that appears to answer the question.

In *Lawrence* v. *Florida*, 549 U.S. 327 (2007), this Court explained that an appeal is no longer "pending" "[a]fter the State's highest court has issued its mandate or denied review," because at that point "no other state avenues for relief remain open." Here, the Michigan Supreme Court's order denying review was effective the date it was entered. Mich. Ct. R. 7.315(D). (Michigan courts do not issue mandates for orders.) And Scarber does not dispute that if the time is counted from the denial of his first application for leave in state collateral review, his habeas petition is barred by the statute of limitations. Thus, *Lawrence*'s language seems to resolve the case against Scarber.

Scarber contends that the decision below confirms an existing conflict by including decisions that examine whether a case is "pending" after an intermediate state appellate court reaches a decision during the time in which a party may seek another appeal, even if not that appeal is not actually filed. But those cases address a fundamentally different posture than the one posed here, for which there has been relatively little litigation. This difference matters under § 2244(d)(2): taking an *appeal* is part of a prisoner's obligation to exhaust his remedies, while taking a *motion for reconsideration* is not. And in either event, if nothing is filed, nothing is pending.

The question actually presented is a modest one that seems to be governed directly by the language in *Lawrence*. And it also appears to be a relatively pedestrian point that once the state supreme court denies leave and the order is effective, the appeal is no longer pending. Since *Lawrence*, no court has said otherwise. Review is not necessary here.

STATEMENT OF THE CASE

Marlon Scarber was convicted of first-degree felony murder and kidnapping along with two codefendants based on his involvement in the shooting death of Fate Washington in October 2005. He was convicted at a jury trial in 2006 and was sentenced to life imprisonment. His petition for certiorari relates exclusively to whether he filed his habeas petition within the one-year limit of 28 U.S.C. § 2244(d).

The clock started running (the parties agree) when Scarber's conviction became final on direct appeal on March 19, 2009. It became final on that date because the Michigan Supreme Court affirmed his conviction in a published per curiam opinion on December 19, 2008, *People* v. *Taylor*, 759 N.W.2d 361 (Mich. 2008), and his 90-day period for filing a petition for certiorari in this Court then expired (on March 19, 2009). Scarber then had one year from that date to file his habeas petition. See 28 U.S.C. § 2244(d)(1)(A).

A. Scarber's first state-court application

237 days elapsed (leaving 128 remaining out of the available 365) before Scarber tolled the limitations period by seeking state collateral review: on November 12, 2009, he filed a motion to dismiss with the state trial court. The Michigan Supreme Court denied leave to appeal on March 8, 2011, in an order that was effective the day it was entered. Mich. Ct. R. 7.315(D). Scarber had 21 days in which to seek reconsideration, see Mich. Ct. R. 7.311(G), but he did not file such a motion.

128 days after March 8, 2011, was July 15, 2011.

B. Scarber's second state-court application

Scarber filed a motion for relief from judgment in the state trial court on August 4, 2011—that is, 20 days after July 15, 2011. (If the time is not tolled for the 21 days in which to file his motion for reconsideration, then the one-year period for filing a federal habeas petition had already elapsed.) The Michigan Supreme Court denied leave to appeal on November 25, 2013. Scarber filed his federal habeas petition 11 days later, on December 6, 2013.

C. The decisions below

The district court denied relief, finding that Scarber had not filed within the one-year statute of limitations. In its September 25, 2014 opinion and order, it reasoned that "[o]nce 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." Pet. App. 14a. Specifically, "there was no motion or application for relief pending in any court." *Id.*

The Sixth Circuit affirmed. Like the district court, it found that once the Michigan Supreme Court denied leave, there no longer was any matter pending under § 2244(d)(2): "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." Pet. App. 6a. There was no dissent.

REASONS FOR DENYING THE PETITION

I. This Court's review is not necessary on the straightforward ruling that an application is no longer "pending" once the Michigan Supreme Court denies leave in collateral review.

Few appellate cases have addressed the narrow question that really is presented here: whether an appeal in collateral review remains pending where the prisoner has an opportunity to file (but does not file) a motion for reconsideration from a state high court order denying leave to appeal, where the order is enforceable once entered.

The language in *Lawrence* suggests no. Under Michigan law, such an order is effective immediately. And this answer makes sense, because in ordinary terms an appeal is no longer pending after a state's highest court denies review of a lower court decision.

A. This Court's analysis in *Lawrence* v. *Florida* appears to answer the question.

The question presented focuses narrowly on when a "properly filed application" is "pending." See 28 U.S.C. § 2244(d)(2) ("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 sub-section.") This Court has examined related questions on three occasions.

First, in *Carey* v. *Saffold*, this Court addressed the meaning of "pending" in § 2244(d)(2) for the time period between a lower court decision and the filing of a notice of appeal to a higher state court. 536 U.S. 214, 217 (2002). Relying on a dictionary definition of "pending," this Court determined that a matter is pending in state court on collateral review until "the application has achieved the final resolution through " 'one complete round of the State's established appellate review process,' " which it described as including a filing in a trial court, an appeal to an intermediate court, and a request for further review in the state's highest court. *Id.* at 219, 220. Thus, it includes the time between a decision and an appeal in instances where a filing of a notice of appeal to a higher court actually occurred. *Id.* at 227.

Second, in *Evans* v. *Chavis*, this Court addressed the circumstance where the gap between a decision and a notice-of-appeal filing spanned three years. 546 U.S. 189, 197 (2006). In California, a notice of appeal was timely if filed in a reasonable time, yet the petitioner did not file his notice appeal to the California Supreme Court until three years after the lower court decision. *Id.* at 192, 195. When the California Supreme Court ultimately denied his state-court petition, it did not expressly address the timeliness of the filing. The Ninth Circuit had found that the California Supreme Court order was a merits decision and therefore the petition had not been "dismissed as untimely." *Id.* at 196. This Court reversed, holding that the federal circuit itself must examine the "delay in each case and determine what the state courts would have held in respect to timeliness." *Id.* at 198.

In so ruling, this Court explained that "pending" includes "the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law." *Id*. at 191 (emphasis in original). This emphasis suggested that an untimely appeal would not toll the time period.

Third, in *Lawrence* v. *Florida*, this Court examined whether a matter remained pending on collateral review in state court during the time for filing a petition for certiorari in this Court after the state highest court's decision. 549 U.S. 327, 330–31 (2007). This Court answered in the negative, explaining that the certiorari process is not a part of the "State's post-conviction procedures." *Id*. at 332. Thus, the time did not toll the petition period of 90 days.

Lawrence then explained when state court appellate review of a decision from collateral challenge ended: "State review ends when the state courts have finally resolved an application for state postconviction relief. *After the State's highest court has issued its mandate or denied review*, *no other state avenues for relief remain open*." *Id*. (emphasis added). This Court reasoned that "an application for state postconviction review no longer exists" at that point. *Id*. "All that remains is a separate certiorari petition pending before a *federal* court." *Id*. In short, the application for state post-conviction review was "no longer 'pending' after the state court's postconviction review [was] complete," and therefore "§ 2244(d)(2) does not toll the 1–year limitations period during the pendency of a petition for certiorari." *Id*.

Taken at face value, the language of *Lawrence* provides that the matter is no longer pending under § 2244(d)(2) when (1) the mandate has issued or (2) review is denied. Both had occurred in substance here.

In Michigan, once an application for leave to appeal from a collateral decision is denied, the decision is enforceable. Mich. Ct. R. 7.315(D) ("Unless otherwise stated, an order or judgment is effective the date it is entered."). The order denying leave here was a standard one and so immediately effective. *People* v. *Scarber*, 794 N.W.2d 581 (Mich. 2011) ("On order of the Court, the application for leave to appeal the July 28, 2010 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)."). Under the court rules, the order served the same function as the mandate in *Lawrence*, which under Florida law is "the final judgment in the cause" and requires compliance by the trial court. *Superior Garlic Intern., Inc.*, v. *E & A Produce Corp.*, 934 So.2d 484, 485 (Fla. Dist. Ct. App. 2004).

The Sixth Circuit recognized that *Lawrence* was dispositive on the issue. Pet. App. 5a ("[w]hen the state courts have issued a *final judgment* on a state application, it is no longer pending" (quoting *Lawrence*, 549 U.S. at 334)). For this reason, the Sixth Circuit rightly noted that under Michigan law "[r]eview of Scarber's post-conviction motion ended when the Michigan issued a final order denying his application for leave to appeal[.]" *Id.* (The Sixth Circuit, though, mistakenly quoted the court rule on finality for trial courts, Pet. App. 5a, when it should have quoted Rule 7.315(C) and (D).)

It is true that the analysis in *Lawrence* was not examining the posture of this case. Scarber in reply thus may argue under *Lawrence* that another "state avenue[ ] for relief remain[s] open" for Scarber after the Michigan Supreme denied his application for leave, *id*. at 332, namely the filing of a motion for reconsideration. But he had completed "a full round of collateral review" that gave the state courts a full opportunity "to 'correct' any 'constitutional violation in the first instance,' " *Carey*, 536 U.S. at 220, and in any event he did not avail himself of that option. Accordingly, the case was not pending again after the denial, and the judgment remained enforceable throughout.

Moreover, none of the cases Scarber cites—other than the Sixth Circuit decision below—address whether a motion for reconsideration constitutes such an avenue for relief when not filed. Pet. 10–16. In fact, even those cases cited by Scarber that ruled in favor of the position adopted by the Sixth Circuit here did not consider this language from *Lawrence*. Pet. 16 (citing *Saunders* v. *Senkowski*, 587 F.3d 543, 548–49 (2d Cir. 2009), and *Simms* v. *Acevedo*, 595 F.3d 774 (7th Cir. 2010)).

In other words, the decision in *Scarber* from the Sixth Circuit is the first case from the federal circuits applying the language from *Lawrence* to a case examining whether there is tolling under § 2244(d)(2) for a motion for reconsideration from a state highest court's denial of leave. This Court should await further decisions before granting certiorari on this issue to see if the other circuits reach different conclusions or if the Sixth Circuit's resolution will be followed by the other circuits.

B. Few circuits have addressed an unfiled reconsideration motion, and none have found tolling since *Lawrence*.

The question whether a matter is "pending" during the time in which a prisoner may *appeal* an order of an intermediate court to the state's highest court is distinct from the question whether the matter remains pending after the state's highest court denies leave but a motion for *reconsideration* may be filed. In the first, the prisoner has the opportunity to appeal the decision to a higher court for the first time, while in the second, the prisoner asks the same court to examine the issue a second time. The questions are not the same under § 2244(d)(2), which corresponds to a petitioner's exhaustion obligation to give the state courts one full opportunity to correct any errors. *Carey*, 536 U.S. at 220. But for either an appeal or reconsideration, a failure to file at all means no application remains pending. And *Lawrence*'s explanation that an appeal is not "pending" after "the State's highest court has issued its mandate or denied review," *id.* at 332, is relevant to answer the question for a reconsideration period.

Scarber's petition is insensitive to this distinction. It examines the decisions of the federal appellate courts on intermediate decisions and the period of appeal interchangeably with reconsideration motion time-periods. Only by doing so may it assert that the conflict here is "deep and wid[e]." Pet. 11.

But this distinction matters because the tolling period exists to allow a habeas petitioner meet his obligation under § 2254(c) of exhausting his claims in state court. E.g., *Artuz* v. *Bennett*, 531 U.S. 4, 10

(2000) ("[T]he object of § 2244(d)(2)" is "to enable the exhaustion of available state remedies."). A habeas petitioner must seek leave to appeal to the state highest's court, even though review is discretionary, in order to satisfy his duty to give the state courts a fair opportunity to act on his claim. *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 845 (1999). No such duty exists for reconsideration motions. Indeed, if Scarber is right that Congress intended to toll the time period for seeking reconsideration in a state's highest court, then that would also mean that Congress intended that prisoners would exhaust that step. So ruling for Scarber would be a recognition that if a prisoner fails to seek reconsideration, then he has failed to exhaust. And as a result, States trying to follow Congress's intent would therefore feel compelled to challenge failures to file for reconsideration as failures to exhaust.

Six of the seven cases that Scarber identifies as conflicting with the Sixth Circuit decision fall on the other side of this distinction, because they actually involve appeal periods, not reconsideration periods. Pet. 11–16; *Taylor* v. *Lee*, 186 F.3d 557, 560–61 (4th Cir. 1999) (tolling when the prisoner filed a petition for writ in state's highest court and later filed for certiorari in this Court); *Swartz* v. *Meyers*, 204 F.3d 417, 418 (3d Cir. 2000) (tolling during time between an appellate court's decision and the time for seeking an allowance to file an appeal to the state supreme court even when unfiled); *Williams* v. *Cain*, 217 F.3d 303, 306–11 (5th Cir. 2000) (no tolling for a prisoner who fails to file his appeal to state's highest court within proper time); *Currie* v. *Matesanz*, 281 F.3d 261, 266–72 (1st Cir. 2002) (tolling for time for taking an appeal from trial court to the next level of review); *Williams*

v. *Bruton*, 299 F.3d 981, 982–84 (8th Cir. 2002) (tolling from a state court decision during the time in which prisoner could have filed an appeal to a state appellate court even if not filed); *Cramer* v. *Secretary, Dep't of Corrections*, 461 F.3d 1380, 1383–84 (2006) (tolling from a state court decision during time in which prisoner could have filed an appeal to a state appellate court even if not filed).

And even the one case that has this posture that Scarber cites, Pet. 13, the court did not have the opportunity to examine the language from *Lawrence*, as *Lawrence* was issued three years later. *Serrano* v. *Williams*, 383 F.3d 1181, 1185 (10th Cir. 2004) (tolling for time period after a state's highest court's denial of review for a collateral challenge during which the prisoner might have sought rehearing). And the other case that expressly addresses rehearing (apparently at the trial court level) also preceded *Lawrence*. *Nix* v. *Secretary for Dep't of Corrections*, 393 F.3d 1235, 1237 (11th Cir. 2004) (stating that tolling occurs during time for filing a rehearing motion in holding that "the district court did err in failing to toll the statute of limitations during Nix's appeal.")

Like Scarber, the Sixth Circuit identified some circuits that disagreed with its analysis, listing some of the same cases that Scarber relies on. Pet. App. 6a (citing *Swartz*, *Serrano*, *Taylor* v. *Lee*, *Currie*, *Bruton*, *Cramer*). Also like Scarber, the Sixth Circuit does not delineate between those decisions that examine tolling for the period for filing an appeal and those that examine tolling for the time for filing a motion for reconsideration or rehearing, and did not cite a case that tolled for the reconsideration period *when the prisoner*

did not seek reconsideration. None of the cases cited by the Sixth Circuit address the circumstance here. Pet. App. 6a (citing *Jenkins* v. *Superintendent of Laurel Highlands*, 705 F.3d 80, 85–86 (3d Cir. 2013) (period was tolled as prisoner's application for leave to state supreme court on state collateral review was properly filed); *Santini* v. *Clements*, 498 F. App'x 807, 809 (10th Cir. 2012) (habeas petition was untimely even though court tolled for the time in which a motion for reconsideration was filed); *Escalante* v. *Watson*, 488 F. App'x 694, 702 (4th Cir. 2012) (Davis, J., dissenting) (would have remanded for further proceedings on issue whether there is tolling for prisoner whose application for leave to state supreme court was timely but deficient); *Drew* v. *MacEachern*, 620 F.3d 16, 21 (1st Cir. 2010) (habeas petition was untimely where dismissal of petitioner's "gatekeeper motion" to state supreme court was final and unreviewable under state law); *Streu* v. *Dormire*, 557 F.3d 960, 966 (8th Cir. 2009) (habeas petition was untimely even though court tolled for time for filing an appeal to an appellate court even though not filed); *Melancon* v. *Kaylo*, 259 F.3d 401, 406–07 (5th Cir. 2001) (habeas petition was untimely and period not tolled after appeal period lapsed due to failure to file appeal)).

Even without separating the appeals cases from reconsideration cases, the Sixth Circuit explained that "most" of the cases that reflect the competing view of the federal appellate cases "predate" this Court's decisions on § 2244(d)(2), including *Lawrence*. Pet. App. 6a. Scarber attempts to answer this point, arguing that the "contention does not withstand scrutiny." Pet. 17. In making this argument, Scarber relies on three cases: *Drew*, *Streu*, and *Watts* v. *Brewer*, 416

F. App'x 425 (2011). Pet. 17–19. But Scarber's argument does not appreciate the full significance of *Lawrence* and the difference between appeal periods and reconsideration periods.

As noted, *Drew* and *Streu* did not examine reconsideration periods. And in the final case, *Watts*, the Fifth Circuit examined whether the appeal on collateral review was final when the state supreme court denied leave, or 26 days later, when the mandate issued. 416 F. App'x at 430. This Court's language in *Lawrence* addresses the point: no avenues remain after the "State's highest court has issued its mandate or denied review." *Id*. at 332. The Fifth Circuit then examined the state's procedural law and concluded that "an appeal is pending in the [state] court until the mandate is issued." *Watts*, 416 F. App'x at 429. That same analysis supports the Sixth Circuit decision below where in Michigan the judgment is enforceable when entered. Mich. Ct. R. 7.315(D).

By disregarding the distinction between appeal time-periods and reconsideration time-periods, Scarber has really identified only a single case—*Serrano*—in which an appellate tolled for the reconsideration period when no reconsideration motion was filed. Cf. *Emerson* v. *Johnson*, 243 F.3d 931, 935 (5th Cir. 2001) (tolling for reconsideration where the prisoner *actually filed* a motion for reconsideration).

Even aside from the helpful language that *Lawrence* provides, the *Serrano* case involved significantly different facts from this case. In *Serrano*, the prisoner actually filed his federal habeas petition, and that filing occurred during the time period in which the prisoner could have filed a motion for rehearing in state

court. 383 F.3d at 1183 (filed his federal habeas petition seven days after the state supreme court denied his state petition where state rules provided 15 days in which to file motion for rehearing). Not so here. Scarber is arguing that he should receive tolling for 21 days, from March 9, 2011, until March 30, 2011, see Pet. 6, even though he took no action in state court and no action in federal court during that time. It is one thing to argue that the matter should have been tolled because he could have filed in state court but filed in federal court instead, as the prisoner in *Serrano* argued, but another to argue as here where no action was taken at all.

The fact that there are no other cases with a similar posture that apply *Lawrence* and reached a different result is telling. It undermines the contention that this is an open issue that is "frequently recurring" and "exceptionally important." Pet. 3, 20. Even those circuits like the Sixth Circuit below that reached this issue and refused to toll are just a handful.

C. On the merits, a case in Michigan is not still "pending" on appeal once the Michigan Supreme Court denies leave.

The conclusion that Scarber's appeal from his collateral challenge was no longer "pending" under § 2244(d)(2) once leave was denied on March 8, 2011, comports with purpose of requiring exhaustion and with the ordinary use of language. Again, the order was enforceable upon entry. Mich. Ct. R. 7.315(D). Thus, no action was pending, and the decision was final for appellate purposes.

Scarber may insist that "other state avenues for relief remain open" in Michigan, see *Lawrence*, 549 U.S. at 332, because the habeas petitioner may still file a motion for reconsideration for 21 days under Michigan's appellate rules. Mich. Ct. R. 7.311(G). But those avenues exist to offer a prisoner *one* full opportunity to exhaust state remedies, not to offer two bites at the apple in each state court. And in any event, where the habeas petitioner fails to file that motion, such a motion was never pending before the Michigan Supreme Court. The matter would become "pending" again only if actually filed. Otherwise, the appeal is closed and would not be considered "pending" at any time after the decision as a matter of Michigan law.

Whether an application is still "pending" depends on state law, as is illustrated by the fact that the answer is not the same in Michigan if a party sought *rehearing*, as contrasted with reconsideration. Under Michigan's rules, rehearing arises from an opinion, not an order. Compare Mich. Ct. R. 7.311(F) (motion for rehearing), with Mich. Ct. R. 7.311(G) (motion for reconsideration). When an opinion (as opposed to an order) is issued, the decision is *not* final but remains open. The equivalent of the mandate, i.e., the judgment, issues 21 to 28 days after the decision (unless a motion for rehearing is filed). Mich. Ct. R. 7.315(C)(2)(a).

Thus, applying the plain language of the analysis in *Lawrence*, the answer depends on Michigan law and whether the decision was an opinion or an order. Since the decision here was an order (as the vast majority of decisions from the Michigan Supreme Court on collateral review are), the rules provide that it was

enforceable upon entry and was not subject the later provision of a judgment as for an opinion.

The fact that the answer for Michigan may depend on whether the decision is an order or an opinion confirms the fact-bound and limited significance of the case for this nation's jurisprudence in habeas law generally. While the decision below is correct, any decision affirming it by this Court would not have any significance in states, like Michigan, where decisions may take immediate effect. Review is not necessary here.

CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

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