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*

## SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Petitioner files this brief to bring to the Court's attention the Sixth Circuit's recent decision in *Holbrook* v. *Curtin*, No. 14-1247, ___ F.3d ___, 2016 WL 4271875 (Aug. 15, 2016). In that case, the Sixth Circuit reversed course from its earlier unpublished decision in *Quatrine* v. *Berghuis*, No. 14-1323, 2016 WL 1457878 (Apr. 12, 2016), which held that the limitations period for filing a federal habeas petition challenging a state conviction was not tolled for the time that the petitioner could have sought, but did not seek, leave to appeal the denial of state post-conviction relief. See Reply Br. 4-5. In *Holbrook*, as in *Quatrine*, the Michigan Solicitor General argued (contrary to his argument here, see Br. in Opp. 11-16) that the Sixth Circuit should follow its reasoning in

this case and reach the same result in the appeal context as it did in the reconsideration context. But the Sixth Circuit, distinguishing its decision here, held that tolling is available where a petitioner could have sought, but did not seek, leave to appeal. See 2016 WL 4271875, at *4.

The Sixth Circuit's decision in *Holbrook* simply heightens the need for this Court's intervention. By distinguishing between the appeal and reconsideration contexts, the Sixth Circuit took an approach irreconcilable with those of at least two other courts of appeals, which have expressly applied the same rule across both contexts. See Reply Br. 5. And even if the Sixth Circuit were correct to distinguish between the appeal and reconsideration contexts—and it was not, see *id.* at 3-4—there remains an ample circuit conflict in cases involving motions for reconsideration. Two circuits have held that AEDPA's limitations period is tolled for the time that a petitioner could have sought reconsideration, regardless of whether the petitioner ultimately does so, and three circuits (including the Sixth Circuit in this case) have held the opposite. See *id.* at 5-6. In short, *Holbrook* further muddies the waters in an already murky area of the law. This case continues to warrant the Court's review.

Respectfully submitted.

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