No. _____

In the Supreme Court of the United States

JEFFREY WOODS, WARDEN, PETITIONER

v.

CAMERON TERRELL HOLBROOK

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

PETITION FOR A WRIT OF CERTIORARI

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Attorneys for Petitioner

QUESTION PRESENTED

Whether AEDPA's one-year limitations period tolls during state collateral review for the time between an adverse decision by a lower state court and the deadline for filing of an appeal when no timely appeal is filed.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Jeffrey Woods, warden of a Michigan correctional facility. The respondent is Cameron Terrell Holbrook, an inmate. In the proceedings below, the habeas respondent was Cindi Curtin. Woods is the current warden having custody over Holbrook.

TABLE OF CONTENTS

PETITION APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OPINIONS BELOW

On federal habeas review, the opinion of the Sixth Circuit granting habeas relief (App. 1a–16a) is reported at 833 F.3d 612. The district court's opinion and order denying habeas relief (App. 17a–26a) is unreported, but is available at 2014 WL 65229.

On state-court collateral review, the order of the Michigan Court of Appeals denying leave to appeal (App. 27a) is unreported. The opinion and order of the Oakland County Circuit Court denying the motion for relief from judgment (App. 28a–34a) is unreported.

On state-court direct review, the order of the Michigan Supreme Court denying leave to appeal (35a–36a) is reported at 486 Mich. 931. The order of the Michigan Court of Appeals affirming the conviction (37a–55a) is not reported, but is available at 2010 WL 99010. The conviction was by jury verdict.

JURISDICTION

The Sixth Circuit entered its opinion on August 15, 2016, and denied rehearing en banc on October 26, 2016. App. 1a, 56a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 et seq.), provides:

(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;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(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

This Court has expressly "held that [ ] only a *timely* appeal tolls AEDPA's 1–year limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal in the higher court[.]" *Evans* v. *Chavis*, 546 U.S. 189, 197 (2006) (emphasis in original) (citing *Carey* v. *Saffold*, 536 U.S. 214, 226 (2002)); *Pace* v. *DiGuglielmo*, 544 U.S. 408, 414 (2005) ("[W]e now hold: When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." (quoting *Saffold*, 544 U.S. at 226)). Yet the Sixth Circuit here held the opposite—that an *untimely* appeal tolled that same time period. Its decision conflicts with *Saffold*, *Pace*, and *Evans*.

Making matters worse, at least five other circuits—the Third, Fourth, Eighth, Tenth, and Eleventh—also have binding precedents that allow an untimely appeal (including no appeal at all) to toll that time period and thus also are in conflict with this Court's decisions. As a result, for 28 States across this country, Congress's command in § 2244(d)(2)—that tolling should occur only when a "properly filed application" for collateral review is "pending"—is not being followed, despite this Court's repeated holdings. Instead, federal courts are granting tolling as if they were applying § 2244(d)(1)(A)'s language governing *direct* review—language that expressly includes "the time for seeking . . . review"—instead of § 2244(d)(2)'s language governing *collateral* review, which requires a "pending," "properly filed" application. *Lawrence* v. *Florida*, 549 U.S. 327, 334 (2007) ("The linguistic difference is not insignificant."). Given these conflicts, certiorari is warranted.

STATEMENT OF THE CASE

A. AEDPA's rule for direct review

AEDPA defines when its "1-year period of limitations" for filing a habeas petition begins to run: the period "shall run from . . . the date on which the judgment [of a State court] became final by the conclusion of direct review or the expiration of the *time for seeking such review*." 28 U.S.C. § 2244(d)(1)(A) (emphasis added); *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 653–54 (2012) (on direct review, a "judgment becomes final . . . when the time for pursuing direct review in this Court, or in state court, expires").

B. Holbrook's direct review

In 2008, a jury convicted Holbrook of first-degree murder and possession of a firearm during the commission of a felony. App. 2a. Holbrook shot the victim seven times, and the victim, in a dying declaration, identified him as the shooter. App. 41a–42a. Holbrook appealed to the Michigan Court of Appeals, which affirmed his conviction, App. 37a, and then also appealed to the Michigan Supreme Court, which denied his request for leave to appeal, App 35a. Because Holbrook did not file a petition for certiorari with this Court, the parties agree that his conviction became final on direct review under § 2244(d)(1) when the "time for seeking [direct] review" expired—that is, on August 23, 2010, which was 90 days after the Michigan Supreme Court denied Holbrook leave to appeal. App. 3a, 35a; 28 U.S.C. § 2101(c).

C. AEDPA's rule for collateral review

AEDPA also specifies when its one-year limitations period may be tolled: "The time during which a *properly filed* application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is *pending* shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2) (emphasis added).

D. Holbrook's collateral review

Holbrook's limitations period tolled after 269 days when he filed a motion for relief from judgment in the state trial court on May 19, 2011. App. 3a. After the trial court denied his motion, the Michigan Court of Appeals denied his application for leave to appeal on November 8, 2012, App. 34a, 27a.

The November 8, 2012 order was the last decision by a Michigan court on collateral review because Holbrook did not file an application for leave to appeal to the Michigan Supreme Court within the allowable 56-day window, which ended January 3, 2013. App. 3a. While Holbrook attempted to file an application for leave to appeal four days late (on January 7, 2013), the Michigan Supreme Court rejected the filing without docketing it. App. 57a.

E. Holbrook's habeas proceedings

Holbrook filed his federal habeas petition on March 18, 2003. App. 3a–4a & n.2. The district court dismissed his petition as untimely, reasoning that 269 days expired between August 23, 2010 (the end of di-

rect review) and May 19, 2011 (when he filed for collateral review in state court), and that the remaining 96 days started running on November 8, 2012 (when the Michigan Court of Appeals denied leave) and ran out on February 12, 2013. App. 22a. The district court thus concluded that Holbrook's habeas petition, which was dated March 1, 2013, but not given to prison officials for mailing until March 18, 2013, was untimely. App. 22a.

When deciding whether to toll the 56-day period allotted under Michigan law for filing an application for leave to appeal to the Michigan Supreme Court, the district court relied on this Court's interpretation of "pending" in § 2244(d)(2): "A post-conviction motion is 'pending,' within the meaning of 28 U.S.C. § 2244(d)(2), during '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.' " App. 22a (quoting *Evans* v. *Chavis*, 546 U.S. 189, 191 (2006) (emphasis in original text of *Evans*), and citing *Carey* v. *Saffold*, 536 U.S. 214 (2002)). Applying this interpretation, the district court concluded that because Holbrook did not timely seek leave to appeal from the Michigan Supreme Court, his motion was no longer pending after the Michigan Court of Appeals denied leave to appeal on November 8, 2012. App. 22a.

The district court also concluded that Holbrook was not entitled to equitable tolling (1) because he did not establish that he missed the deadline because of circumstances beyond his control and (2) because he did not make a credible showing of actual innocence. 23a–24a.

The Sixth Circuit reversed, concluding that Holbrook's habeas petition was timely, and remanded for consideration of the merits of his petition. App. 2a; App. 7a ("Because we find that Holbrook is entitled to statutory tolling, we need not address his equitable tolling claim."). In the view of the Sixth Circuit, Holbrook had a "properly filed application" that was still "pending," as § 2244(d)(2) requires, during the 56-day window available for appealing because *Evans* does not "require that a court retroactively reach back through a State post-conviction motion's pendency to start the limitations clock at the lower court's decision when an appeal from that decision is not timely filed." App. 6a, 9a. According to the Sixth Circuit, "*Evans* stands only for the proposition that the entire unexplained three-year delay between the adverse decision of the lower court and an untimely appeal could not be 'reasonable' under California law." App. 10a.

The Sixth Circuit also relied on *Gonzalez* v. *Thaler*, 132 S. Ct. 641 (2012), and *Clay* v. *United States*, 537 U.S. 522 (2003), two cases interpreting when a judgment "become[s] 'final' on direct appeal"—as opposed to on collateral review—for purposes of § 2244(d)(1)(A)'s language about "the 'time for seeking review' "—as opposed to § 2244(d)(2)'s language about whether a "properly filed application" for "collateral review" is "pending." App. 12a–13a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's decision conflicts with this Court's holdings in *Saffold*, *Pace*, and *Evans*.

This Court has repeatedly held that a petitioner must file a *timely* appeal to be entitled to toll the time in the interval between a lower court's adverse decision and the filing of an appeal.

In *Carey* v. *Saffold*, 536 U.S. 214 (2002), this Court considered whether an application was "pending" under § 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." *Id*. at 217. This Court concluded that it was. *Id*. The case was complicated by the fact that California has a "unique collateral review system" that did not set out a precise deadline by which to appeal, but instead required the filing to occur "within a reasonable time." *Id*.; accord *id*. at 235 (Kennedy, J., dissenting) (agreeing that California "does not have a strict time limit" for filing an appeal). But despite the vagueness of California's deadline, the Court made clear that if the application were untimely, then there would be no tolling: "If the California Supreme Court clearly ruled that Saffold's 4½-month delay was 'unreasonable,' that would be the end of the matter . . . ." *Id*. at 226. Thus, this Court later summarized *Saffold*'s first holding (of three) as allowing tolling for the filing interval only if a filing is timely: "In *Saffold*, we held that (1) only a *timely* appeal tolls AEDPA's 1-year limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal in the higher court . . . ." *Evans*, 546 U.S. at 197 (emphasis in original).

In *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005), this Court addressed "whether a state postconviction petition rejected by a state court as untimely nonetheless is 'properly filed' within the meaning of § 2244(d)(2)" and held "that it is not." *Id.* at 410. The Court reasoned that *Artuz* v. *Bennett*, 531 U.S. 4 (2000), "held that time limits on postconviction petitions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed.' " *Pace*, 544 U.S. at 413 (quoting *Artuz*, 531 U.S. at 8, 11). If that were not the case, "a state prisoner could toll the statute of limitations at will simply by filing untimely state postconviction petitions." *Id.* This Court then noted that it had explained in *Saffold* that " '[i]f the California Supreme Court had clearly ruled that Saffold's 4½-month delay was unreasonable,' i.e., untimely, '*that would be the end of the matter*, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was entangled with the merits.' " *Id.* at 414 (quoting *Saffold*, 536 U.S. at 226) (some quotation marks omitted; emphasis in original). Removing any doubt about the principle established in *Saffold*, the *Pace* Court said, "What we intimated in *Saffold* we now hold: When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Id.* (alteration in original). And although *Pace*'s ruling involved a trial-court filing, rather than an appellate filing, an appellate filing is an "application for State post-conviction or other collateral review," § 2244(d)(2), as this Court had already recognized in *Saffold*. 536 U.S. at 223 (equating an application with an appeal: "a review application (*i.e.*, a filing in a higher court)").

In *Evans* v. *Chavis*, 546 U.S. 189 (2006), this Court again reaffirmed *Saffold*'s holding that a habeas petitioner benefits from tolling only if he meets the condition of filing a timely appeal: "If the filing of the appeal is timely, the period between the adverse lower court decision and the filing . . . is not counted against the 1-year AEDPA time limit." *Id.* at 192. Indeed, *Evans* emphasized in its opening paragraph the necessity of a timely filing: "The time that an application for state postconviction review is '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) (citing *Saffold*). Applying *Saffold*'s holding, this Court in *Evans* concluded that the habeas petition at issue was untimely, even under California's amorphous "reasonable time" system, where the petition was filed three years after the lower court's decision. *Id.* at 192, 200–01. While the Ninth Circuit had "held that the state collateral review application was 'pending' " during the three-year filing interval and had not been dismissed as untimely, *id.* at 196, this Court rejected that reasoning as "in conflict with our *Saffold* holding." *Id.* at 200.

The same conflict exists here. Holbrook's application for leave to appeal to the Michigan Supreme Court was untimely. App. 57a (affidavit by clerk of the Michigan Supreme Court confirming that Holbrook's application "was a late application (beyond 56 days)" that was "rejected"). Yet despite the holdings of *Saffold*, *Pace*, and *Evans*, the Sixth Circuit tolled the time between the lower-court decision and the time for filing an application even though Holbrook's application

for leave to appeal was untimely under state law. Contra, e.g., *Evans*, 546 U.S. at 197 ("In *Saffold*, we held that (1) only a *timely* appeal tolls AEDPA's 1-year limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal in the higher court . . . .") (emphasis in original).

II. At least five other circuits are also failing to follow this Court's holdings and misapplying § 2244(d), an important federal statute.

The Sixth Circuit's conflict with this Court's decision is important in its own right, but the issue is even more important because at least five other circuits also have case law that conflicts with *Saffold* and *Evans*, even though *Evans* is over a decade old.

For example, the Third Circuit continues to believe that a postconviction "petition remains pending 'during the time a prisoner has to seek review of the Pennsylvania Superior Court's decision [by filing a petition for allowance of appeal to the Pennsylvania Supreme Court] *whether or not review is actually sought*' "—that is, even if no timely petition to appeal is filed. *Jenkins* v. *Superintendent of Laurel Highlands*, 705 F.3d 80, 85 n.4 (3d Cir. 2013) (alteration in original; emphasis added) (quoting *Swartz* v. *Meyers*, 204 F.3d 417 (3d Cir. 2000)); see also *Rinaldi* v. *Gillis*, 248 F. App'x 371, 378 (3d Cir. 2007) ("The limitations period . . . is statutorily tolled under § 2242(d)(2) between the Pennsylvania Superior Court's ruling and the deadline for filing a timely request for allowance of appeal to the Pennsylvania Supreme Court, *even if a timely request for allowance of appeal is not filed*." (emphasis added) (citing *Swartz*, 204 F.3d at 420);

Clement v. *Hauck*, 2015 WL 4171839, at *3 (D.N.J. July 10, 2015) ("An application for post-conviction relief is considered 'pending' within the meaning of § 2244(d)(2) during the period between a lower state court's ruling and the period a petitioner has to seek review of the decision, *whether or not the appeal was actually sought*." (emphasis added) (citing *Swartz*, 204 F.3d at 424).

The Fourth Circuit also allows tolling for untimely—and even unfiled—appeals. In *Allen* v. *Mitchell*, 276 F.3d 183 (4th Cir. 2001), the Fourth Circuit reiterated its earlier holding that AEDPA's statute of limitations is tolled during the period between the adverse lower-court decision and the deadline for seeking review even if an appeal is untimely. *Id.* at 185. It identified three time periods "relevant to the availability of tolling for the time span between the denial of relief by the lower court and the conclusion of appellate proceedings" in the event that "a prisoner files an *untimely* appellate petition": "the interval between the lower court decision and the deadline for seeking review ('Appeal Period'); the interval between this deadline and the filing of an appellate petition ('Post Deadline Period'); and the interval during which the appellate petition is under review by the state court ('Review Period')." *Id.* (emphasis added). It then explained that it had "already held that the statute of limitations is tolled pursuant to § 2244(d)(2) during the Appeal Period." *Id.* (citing *Taylor* v. *Lee*, 186 F.3d 557, 561 (4th Cir. 1999)). This principle is still followed in the Fourth Circuit. E.g., *Royster* v. *Perry*, 2016 WL 375076, at *3 (M.D.N.C. Jan. 29, 2016) ("[S]tate collateral filings generally toll the federal ha-

beas deadline for 'the entire period of state post-conviction proceedings, from initial filing to final disposition by the highest court (whether decision on the merits, denial of certiorari, or *expiration of the period of time to seek further appellate review*)' " (quoting *Taylor*, 186 F.3d at 561, and adding emphasis)).

The Eighth Circuit also follows this erroneous approach. Despite *Saffold*'s holding and despite this Court's repetition of that holding in *Evans*, the Eighth Circuit still holds "that an application for state post-conviction or other collateral review remains "pending" during the time in which a prisoner may appeal a denial of the application, *even if the prisoner does not appeal*." *Streu* v. *Dormire*, 557 F.3d 960, 966 (8th Cir. 2009) (emphasis added) (citing *Williams* v. *Bruton*, 299 F.3d 981, 983 (8th Cir. 2002)).

The Tenth Circuit follows the same rule. Despite this Court's repeated rulings to the contrary, the Tenth Circuit posits that the "AEDPA limitations period is tolled during the period in which a petitioner *could have sought* an appeal under state law, including certiorari." *Santini* v. *Clements*, 498 F. App'x 807, 809 (10th Cir. 2012) (emphasis added) (citing *Serrano* v. *Williams*, 383 F.3d 1181, 1185 (10th Cir. 2004)); see also, e.g., *Melina* v. *Pollard*, 654 F. App'x 939, 942 (10th Cir. 2016) (" 'time allowed for appeals tolls the AEDPA limitations period, including the time for filing a motion for rehearing, *even if no such filing is made*' ") (emphasis added) (quoting *Serrano*, 383 F.3d at 1185). Thus, just like the Third, Fourth, Sixth, and Eighth Circuits, the Tenth Circuit ignores that this Court has "held that time limits on postconviction pe-

titions are 'condition[s] to filing,' such that an untimely petition would not be deemed 'properly filed,' " *Pace*, 544 U.S. at 413 (quoting *Artuz*, 531 U.S. at 8, 11), and ignores that this Court has held that "only a *timely* appeal tolls AEDPA's 1-year limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal in the higher court . . . ." *Evans*, 546 U.S. at 197 (emphasis in original, citing *Saffold*). These circuits have, in short, done away with the requirement that a habeas petitioner must file *on time* to have a "pending" petition by saying that he need not file *at all*.

And so has the Eleventh Circuit. In its view, "even if [habeas petitioner] Cramer did not seek appellate review" on collateral review, "the claim remained pending under 28 U.S.C. § 2244(d) until the time to file an appeal expired." *Cramer* v. *Sec'y, Dep't of Corr.*, 461 F.3d 1380, 1382 (11th Cir. 2006). The Eleventh Circuit cited both *Saffold* and *Evans*, but nonetheless stated that "[n]othing in the caselaw dictates that an appeal must be taken for the claim to remain pending." *Id.* at 1383; but see *Evans*, 546 U.S. at 197 (2006) ("In *Saffold*, we held that (1) only a *timely* appeal tolls AEDPA's 1–year limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal in the higher court . . . .") (emphasis in original). The Eleventh Circuit apparently failed to realize that an appeal cannot be timely if it is never filed. And it still follows that mistaken course today. E.g., *Westmoreland* v. *Warden*, 817 F.3d 751, 753 (11th Cir. 2016) ("[I]f a properly filed state application is denied, then the time for appealing this denial tolls the federal filing deadline . . . 'regardless of whether

the inmate actually files the notice of appeal.' " (quoting *Cramer*, 461 F.3d at 1383).

The decisions of these circuits conflict not just with this Court's decisions in *Saffold*, *Pace*, and *Evans*, but also with the plain language of § 2244(d). By allowing tolling even when a petitioner has not filed a timely appeal, these circuits are treating § 2244(d)(2) as if it provided tolling until "the expiration of the time for seeking review." But language to that effect appears only in § 2244(d)(1)(A), which addresses when direct review ends and thus when the limitations period start, and not in § 2244(d)(2), which addresses tolling on collateral review. As this Court has explained, "[t]he linguistic difference" between (d)(1)(A) and (d)(2) "is not insignificant." *Lawrence*, 549 U.S. at 334. "[Section] 2244(d)(2) makes no reference to the 'time for seeking' review of a state postconviction court's judgment," as § 2244(d)(1)(A) does, but "[i]nstead, it seeks to know when an application for 'State . . . review' is pending." *Id.* at 333–34. Yet these circuits have disregarded this distinct language and treated § 2244(d)(2) as if it were § 2244(d)(1)(A). See, e.g., *Swartz*, 204 F.3d at 421 (drawing from caselaw under § 2244(d)(1) and applying it to reach the conclusion "that for purposes of § 2244(d)(2) 'pending' includes the time for seeking discretionary review, whether or not discretionary review is sought"); App. 12a–13a (drawing from caselaw under § 2244(d)(1)(A), namely *Gonzalez*, 132 S. Ct. at 653–54, and *Clay*, 537 U.S. at 524–25).

This outcome is also inconsistent with the purpose of § 2244(d)(2): to "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas

petitions *as soon as possible*." *Lawrence*, 549 U.S. at 333 (quoting *Duncan* v. *Walker*, 533 U.S. 167, 179, 181 (2001), and adding final emphasis). When a habeas petitioner has not filed a timely appeal, or any appeal at all, he is not attempting to exhaust his state remedies. There is therefore no reason to think that Congress intended to give him the benefit of tolling for that time period. And while some circuits rely on the comment from *Saffold* that " 'until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending,' " e.g., *Williams*, 299 F.3d at 983 (quoting *Saffold*, 536 U.S. at 220), they overlook the fact that if a prisoner does not file a timely appeal, his post-conviction process achieved final resolution when lower state court denied his request for relief.

Ironically, the Sixth Circuit stated the correct rule just last year, but this panel treated that statement as dicta and adopted the wrong rule. In *Scarber* v. *Palmer*, 808 F.3d 1093 (6th Cir. 2015), cert. denied, 137 S. Ct. 37 (2016), Judge Boggs (writing for a unanimous panel) correctly reasoned that "the period between an adverse lower-court decision and an *untimely* appeal *does* count toward the AEDPA limitation period." *Id*. at 1096 (emphasis in original). He followed this Court's reasoning in *Lawrence*, acknowledging that " '[t]he linguistic difference' " between § 2244(d)(1)(A)'s "time for seeking [direct] review" and § 2244(d)(2)'s requirement that a properly filed application for collateral review be "pending" " 'is not insignificant.' " *Id*. at 1095 (quoting *Lawrence*, 549 U.S. at 334; see also *Saunders* v. *Senkowski*, 587 F.3d 543, 549 (2d Cir. 2009) ("[T]he timing-related language of 28 U.S.C. § 2244(d)(1)(A) expressly provides that the

limitations period begins to run on 'the date on which the judgment became final by the conclusion of direct review *or the expiration of the time for seeking such review*,' whereas § 2244(d)(2) provides for tolling only during the time in which 'a properly filed application for State post-conviction or other collateral review with respect to a pertinent judgment or claim is pending.' "). And he discussed both *Saffold* and *Evans* and correctly repeated the rule they announced: "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.' " *Id*. at 1096 (quoting *Evans*, 546 U.S. at 191). He recognized that the failure to file a timely appeal matters: "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." *Scarber*, 808 F.3d at 1096 (parallel citations omitted; alteration in original). But the panel here treated *Scarber*'s statutory analysis as dicta. App. 12a.

The tolling calculation under § 2244(d)(2) is a recurring issue in courts across the country, and as evidenced by the cases cited already, has ongoing significance. And the timeliness of collateral-review filings is a significant federalism issue because it determines whether federal courts will respect state filing deadlines or ignore them. See *Saffold*, 536 U.S. at 220 (recognizing "AEDPA's goal of promoting 'comity, finality, and federalism' " (quoting *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000)). In at least six circuits—the Third, Fourth, Sixth, Eighth, Tenth, and Eleventh, which include 28 States—those filing deadlines are

being ignored. In those circuits, binding circuit precedent conflicts with this Court's decisions and yet is still being followed. And that means that habeas petitioners are being granted tolling for time periods when they are, as Judge Boggs put it, sitting on their hands. *Scarber*, 808 F.3d at 1096.

Because these circuit decisions conflict with both this Court's decisions and with the plain statutory language of § 2244(d), this Court should grant the petition and reverse.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Attorneys for Petitioner

Dated: JANUARY 2017