No. 07-_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

KEVIN GREEN,
Petitioner,

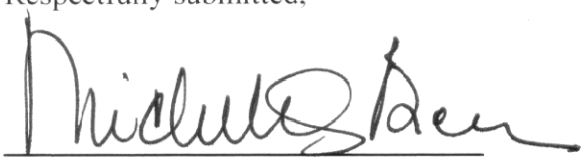
v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

Motion for Leave To Proceed *In Forma Pauperis*

Petitioner Kevin Green requests leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. Petitioner was previously granted leave to proceed *in forma pauperis* in the United States District Court for the Eastern District of Virginia and the United States Court of Appeals for the Fourth Circuit. Counsel for Petitioner were appointed below under the Criminal Justice Act.

Respectfully submitted,



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

CAPITAL CASE

Imminent Execution Scheduled
May 27, 2008 at 9:00 p.m. EDT

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Capital Case

QUESTIONS PRESENTED

AEDPA sets a one-year limitation period for state prisoners to file federal petitions for writs of habeas corpus, running from "the date on which the judgment 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). The one-year clock is stopped, however, during the time the petitioner's "properly filed" application for state postconviction relief is pending. 28 U.S.C. § 2244(d)(2). This case presents closely interconnected questions concerning Green's challenge to his capital murder conviction and sentence:

1. Did the Fourth Circuit commit egregious error requiring summary correction when it failed to start the federal limitations period on the date when Green's capital murder judgment became final, as mandated by Congress and by this Court's precedents, and instead dismissed his claim as untimely by using an earlier limitations date not authorized by Congress?

2. In the alternative, did the Fourth Circuit err in denying equitable tolling for the eight months that elapsed prior to the date when Green's capital murder judgment became final?

3. In determining whether a petitioner's state application was "properly filed" for purposes of statutory tolling under § 2244(d)(2):

    a. Must federal habeas courts base their decision on whether the application as a whole was properly filed, as the Court suggested in *Artuz v. Bennett*, or must the determination be made on a claim-by-claim basis, as the Court suggested in *Pace v. DiGuglielmo*?

    b. Can a state court's procedural rule constitute a valid condition to filing if the federal court determines that the procedural rule, when applied to the applicant's claim (or application), did not rest on adequate state law grounds?

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IN THE
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Kevin Green, who is scheduled to be executed by the Commonwealth of Virginia on May 27, 2008 at 9:00 p.m., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming a district court's denial of relief on Green's petition for habeas corpus.

OPINIONS BELOW

The opinion supporting the judgment presented for review is that of the court of appeals reported as *Green v. Johnson*, 515 F.3d 290 (4th Cir. 2008), which is reprinted at Pet. App. 1a..[1] The opinion of the district court denying habeas relief is reported as *Green v. Johnson*, 2007 WL 951686 (E.D. Va. Mar. 26, 2007), which is reprinted at Pet App. 22a. This opinion adopted, in most respects, the more detailed Report and Recommendation ("R&R") of

[1] The Appendix filed with this Petition is cited as "Pet. App." The Joint Appendix filed in the Fourth Circuit is cited as "JA."

the federal magistrate judge reported as *Green v. Johnson*, 2006 WL 3746138 (E.D. Va. Dec. 15, 2006), which is reprinted at Pet. App. 35a.

JURISDICTION

The Fourth Circuit entered judgment on February 11, 2008. The court of appeals denied Green's timely petition for rehearing and rehearing en banc on March 11, 2008. Pet. App. 85a. Green invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, 28 U.S.C. § 2244(d)(1) and (d)(2), and Va. Code §§ 8.01-654 and 8.01-654.1. The text of these provisions is reproduced at Pet. App. 86a.

STATEMENT[2]

A. Quirks of State Law.

The history of this case is straightforward, but the statement of the case may seem convoluted because of some critical and unusual features of Virginia law:

1. An attorney appointed in a Virginia capital case must represent the defendant both at trial and on direct appeal. Va. Code § 19.2-163.7. If the trial court imposes a death sentence, the defendant often has to appeal simultaneously in two different courts. He has an appeal as of right to the Virginia Supreme Court for the capital murder conviction and death sentence. Va. Code § 17.1-406. He must petition for discretionary review by Virginia's intermediate appellate court for any accompanying noncapital convictions – even though the noncapital convictions arose from the same criminal transaction and were tried at the same trial as the capital offense. *Id*. For example, if the defendant is convicted of capital murder and sentenced to death and also

[2] To assist the Court, a chronology of events relevant to the questions presented is reprinted at Pet. App. 163a.

is convicted of using a firearm in the commission of that offense, he must appeal those convictions to separate courts. If the defendant notices both appeals, the Virginia Supreme Court has discretion to transfer the noncapital appeal to its own jurisdiction and consolidate it with the capital appeal. Va. Code § 17.1-409.

2. If the Virginia Supreme Court upholds the death sentence on direct appeal, state law entitles an indigent defendant to new counsel for state habeas proceedings. The trial court must appoint habeas counsel within 30 days after the final decision on direct appeal. Va. Code § 19.2-163.7. Even though the appointment results from the fact that there is a death sentence, the habeas petition is not limited to claims that arise from the death sentence or from the capital murder conviction. If the defendant wants to challenge his noncapital convictions from the same trial, he must include these challenges in the same petition or they are forfeited. *See Dorsey v. Angelone*, 544 S.E.2d 350 (Va. 2001). The Virginia Supreme Court has exclusive original jurisdiction over the entire state habeas petition of a defendant who has a death sentence.

3. For purposes of state habeas proceedings, Virginia employs varying definitions of finality and uses varying statutes of limitation, depending on the defendant's sentence. If he is under a sentence of death, his convictions become final under state law at the same point they become final under federal law: that is, when this Court denies certiorari following direct appeal, affirms the judgment after granting certiorari, or the time expires to file a petition for certiorari. This triggers the state statute of limitations for habeas cases where the defendant is under sentence of death, which runs for 60 days. Va. Code § 8.01-654.1, Pet. App. 90a.

If the defendant is not under a death sentence, his convictions become final under state law after disposition of the direct appeal or expiration of the time to pursue an appeal. The deadline for such a defendant to file a habeas petition is either two years after entry of final

judgment in the trial court, or one year after disposition of the direct appeal or expiration of the time for filing such an appeal, whichever is later. Va. Code § 8.01-654(A)(2), Pet. App. 88a. As these numbers show, the habeas limitations period for capital convictions is intended to be shorter than for noncapital convictions.

4. A state habeas petition must contain all allegations whose facts are known at the time of filing. Va. Code § 8.01-654(B)(2), Pet. App. 88a. At all times relevant to Green's state habeas proceedings, Virginia categorically prohibited applicants from presenting additional claims in a second or successive habeas petition unless those claims were based on facts not known at the time the applicant filed his first petition. Virginia enforced this rule ruthlessly, prohibiting the presentation of new claims in a second-in-time petition even when the first petition was a nullity because it was voluntarily withdrawn prior to adjudication. *See, e.g., Dorsey, supra*; *Daniels v. Warden*, 588 S.E.2d 382 (Va. 2003). If trial counsel failed to pursue a direct appeal, for example, the defendant's conviction became final when the time to notice the appeal expired. As a result, the prisoner's one-and-only habeas petition had to allege not only that counsel's deficient performance denied him the right to appeal; it also had to include all other habeas allegations arising from his trial and conviction. Effective July 1, 2005, the Virginia legislature narrowly relaxed the prohibition against second petitions. A prisoner now can take the more logical course of filing a first habeas petition that alleges only the loss of the direct appeal, and then filing a second habeas petition that presents all his other claims once his conviction becomes final after the restored appeal. Pet. App.89a.

B. The Crime and the Original Trial.

In August 1998 Kevin Green, then a 21-year-old with an incomplete middle-school education, shot the proprietors of a small-town convenience store in Southern Virginia while

robbing it with his under-age cousin. Lawrence Vaughan, one of the owners, was wounded but survived. His wife, who was shot four times, did not. Immediately after the offense, Green and his cousin bought round-trip bus tickets to Northern Virginia where, according to Green's statement to the police, they blew nearly all the stolen money (nearly $10,000) on "female hookers, weed, partying, and clothes." They returned home two days later with $170 and were quickly apprehended.[3]

The grand jury issued a single indictment charging Green with one count of robbery, one count of capital murder during commission of that robbery, one count of malicious wounding, and three counts of using a firearm while committing these felonies. JA 13-14. The court appointed two lawyers to represent Green on these charges. At trial, the jury found Green guilty across the board, and the court conducted a penalty phase for jury sentencing on all the offenses. Green's primary mitigation evidence was the defense psychologist's testimony that Green is mentally retarded and that his IQ test score was 55. The prosecution's psychologist disagreed with this diagnosis. He acknowledged that Green's intellectual functioning is low, but noted that Green's score on a second IQ test was 74. The jury ultimately recommended sentences of death for capital murder, life without possibility of parole for robbery, and terms of years for the remaining offenses.[4] On October 6, 2000, the court issued a single judgment order imposing the recommended sentences.

C. The Direct Appeals, the Retrial, and the Final Judgment.

Consistent with Green's desire, his trial lawyers agreed to appeal. They initiated an

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[3] The facts found by the Virginia Supreme Court on direct appeal, which describe the crime more fully, are quoted in the Fourth Circuit's opinion. Pet. App. 6a-7a.

[4] Because this trial occurred prior to *Atkins v. Virginia*, 536 U.S. 304 (2002), mental retardation was presented as a mitigating factor but not a bar to a death sentence. The jury made no determination that Green is, or is not, mentally retarded.

appeal of the capital murder conviction and death sentence in the Virginia Supreme Court. For no strategic reason, and without informing Green, they did not file a notice of appeal for the noncapital convictions.

Green's appeal was successful, and the Virginia Supreme Court reversed his capital murder conviction and death sentence. *Green v. Commonwealth*, 546 S.E.2d 446 (Va. June 8, 2001). The basis for reversal was the participation of two unqualified jurors – one who read pretrial newspaper articles and formed a firm opinion that Green was guilty, and one who had a fixed opinion that a defendant should be sentenced to death if he is found guilty of capital murder. *Id*. at 451-52.

The same lawyers seamlessly continued to represent Green at the capital murder retrial. At the guilt/innocence phase, the jury learned that Green already had been convicted of the underlying robbery. In the penalty phase, the prosecutor informed the jury that Green already was serving a sentence of life without possibility of parole for that robbery. The experts again expressed conflicting opinions about mental retardation.[5] The jury found Green guilty of capital murder and again recommended death. On January 24, 2002, the trial court entered judgment. The Virginia Supreme Court upheld Green's conviction and death sentence on direct appeal. *Green v. Commonwealth*, 580 S.E.2d 834 (Va. June 6, 2003). Green timely petitioned for rehearing, which the court summarily denied on September 12, 2003. Green's capital murder judgment became final on February 23, 2004, when this Court denied his petition for a writ of certiorari. *Green v. Virginia*, 540 U.S. 1194 (Feb. 23, 2004).

D. State Habeas Proceedings.

Meanwhile, back on June 26, 2003, the trial court appointed a new attorney to represent

[5] The retrial also was conducted prior to *Atkins*, and the jury made no determination of whether Green is mentally retarded.

Green in state habeas proceedings. This lawyer had not previously represented Green and he was not familiar with the facts or issues in his case. There is no dispute that Green's habeas petition was filed in the Virginia Supreme Court within 60 days after the date when his judgment for capital murder became final, consistent with state law. The date of filing was April 22, 2004.

In his state habeas petition, Green alleged that in violation of the Sixth Amendment, trial counsel rendered constitutionally ineffective assistance with respect to both the capital and noncapital convictions by failing to notice an appeal of the noncapital convictions. First, counsels' omission deprived Green of a new trial on the noncapital charges. Pet. App. 93a. Second, counsels' omission deprived Green of a fair retrial on the capital murder charge. Pet. App. 94a. Because of counsels' deficient performance, they had to advise the jurors in the guilt phase of the retrial that Green already had been found guilty of robbery, and this may have contributed to the jurors' determination that Green was guilty of capital murder during commission of that robbery.[6] Moreover, the jurors were told by stipulation in the penalty phase that Green already was serving a sentence of life without possibility of parole for the robbery. There is a strong probability this skewed the jurors' ultimate selection of the appropriate sentence for capital murder because it left them with no option but to sentence Green to death if they did not want to give him a "free pass" on punishment for murder.

There can be no doubt that Green's claim challenged, in part, the constitutionality of the capital murder judgment. The habeas relief he requested in this claim expressly included "vacat[ing] the conviction of capital murder." Pet. App. 96a. That is a form of relief Green could obtain only from a challenge to the constitutionality of the capital murder judgment.

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[6] Counsel disclosed this information to the jurors in the guilt phase in order to retain credibility for the penalty phase. Green does not question this strategy, given the box in which counsel had placed themselves. Had counsel noticed an appeal of the noncapital convictions, however, there would have been no extant conviction of robbery and nothing to disclose.

The Respondent himself recognized that this claim challenged the constitutionality of both the capital and noncapital convictions, and he addressed these challenges separately. He argued that the portion of Green's claim challenging the noncapital convictions was time-barred under Va. Code § 8.01-654(A)(2). Pet. App. 102a n.2. For the portion of this claim challenging the constitutionality of Green's capital murder conviction and death sentence, the Respondent did not raise any statute of limitations argument; he simply attempted to defend counsels' performance on the merits. Pet. App. 102a-103a. Without distinguishing the capital and noncapital convictions, the Virginia Supreme Court summarily dismissed this claim in its entirety as barred under the statute governing the time for filing habeas petitions in *noncapital* cases.[7] Pet App105a-106a.

Green's state habeas petition also alleged that he is mentally retarded and that his death sentence violates the Eighth Amendment and *Atkins v. Virginia*. Green supported this allegation with his trial psychologist's expert testimony from both trials that he is mentally retarded. The Virginia Supreme Court summarily dismissed this claim as "frivolous." Pet. App. 112a-113a.

The state court issued its order denying habeas relief on February 9, 2005, and it denied Green's petition for rehearing on April 29, 2005, Pet. App. 116a. Green timely petitioned for certiorari, which this Court denied on December 5, 2005. *Green v. True*, 546 U.S. 1066 (2005).

E. Federal Habeas Proceedings.

Meanwhile, immediately after the Virginia Supreme Court issued its order denying

[7] Oddly, the state habeas court did not apply the same statute of limitations to another claim in Green's petition that challenged both his capital and noncapital convictions. Green alleged that counsel unreasonably failed to suppress his statement to law enforcement officers because he lacked sufficient intellectual functioning to make a knowing, intelligent, and voluntary waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Pet. App. 99a (challenging "convictions"). Without distinguishing the capital and noncapital convictions, the Virginia Supreme Court denied this claim in its entirety on the merits. Pet. App. 108a-109a.

rehearing, the Respondent obtained an expedited writ for Green to be executed on June 8, 2005, which the federal district court stayed on June 6, 2005. On July 8, 2005, and July 18, 2005, the district court issued orders appointing undersigned counsel to represent Green in federal habeas proceedings.[8] These attorneys had not previously represented Green and they were not familiar with the facts or issues in his case. The district court immediately referred the case to a federal magistrate judge.

1. Proceedings Before the Magistrate Judge.

Green filed a federal habeas petition on December 1, 2005. There is no dispute that this was well within one year of the date the judgment for capital murder became final, after tolling the time when his state habeas petition was pending. In fact, the federal limitation period for the capital murder judgment did not expire until three months later, on March 2, 2006.

Green alleged in his federal habeas petition that trial counsel rendered ineffective assistance by failing to file a notice of appeal for the noncapital convictions.[9] As in state court, Green challenged both the capital and noncapital judgments. He asserted that trial counsels'

[8] State habeas counsel's appointment had terminated as a matter of state law at the end of habeas proceedings in the Virginia Supreme Court. Habeas counsel agreed to prepare a petition for certiorari *pro bono,* but he did not make himself available to represent Green in federal habeas proceedings.

[9] Green also alleged in his federal petition that he is mentally retarded under *Atkins*. The magistrate judge concluded that the state court's "frivolousness" decision was based on an unreasonable determination of the facts in light of the evidence before the state court, and he conducted a three-day evidentiary hearing. Green presented testimony from a new psychologist who, consistent with Green's trial psychologist, concluded that Green satisfies all the required elements and is mentally retarded. The Respondent presented testimony from the same psychologist who had testified for the prosecution at Green's criminal trials, who opined again that Green is not mentally retarded. In his R&R, the magistrate judge concluded that Green satisfied the requirements of significantly subaverage intellectual functioning at least two standard deviations below the mean, and onset prior to age 18, Pet. App. 75a, but that Green's limitations in adaptive behavior were not sufficiently significant to meet the final requirement, even though he "struggle[es] to perform some basic activities." Pet. App. 82a.

deficient performance deprived him of a new trial on the noncapital charges and also deprived him of a fair retrial on the capital murder charge. Although Green pursued his challenges to the constitutionality of both the capital and noncapital convictions in all courts below, ***this petition for certiorari is limited to the constitutionality of his capital conviction***.[10] The remainder of this petition discusses only the arguments and judicial determinations made below relating to that allegation, which Green will refer to as "this claim."

On the merits, Green alleged in this claim that he was denied the effective assistance of counsel because trial counsel had failed to notice an appeal of the noncapital convictions, and they knew or should have known that if Green's capital murder appeal was successful, this would taint the retrial. Pet. App. 122a-123a. Green further argued that absent counsels' deficient performance, there was a reasonable probability the results at the retrial would have been different. Pet. App. 123a. Like all of Green's other claims challenging the constitutionality of the capital murder judgment, this claim was timely under 28 U.S.C. § 2244(d)(1)(A) because the federal limitation period began on February 23, 2004, the date the capital murder judgment became final. Green alleged in his federal petition that this claim was not defaulted – notwithstanding the state court's dismissal of this claim as untimely – because the statute of limitations on which the state habeas court had based its decision did not rest on adequate state law grounds in the unusual circumstances of this case. Pet. App. 125a-131a. Green further argued that even if the state court's dismissal rested on adequate state law grounds, there was cause and prejudice for any failure to timely file this claim in state court. Pet. App. 131a-132a.

[10] It is not difficult to fashion a remedy for this challenge even when it is divided from the challenge to Green's noncapital convictions. Green would be retried for capital murder, but the jury would be prohibited from learning – in either phase – that Green had been charged with, convicted of, or sentenced for the noncapital crimes. The jury could, of course, hear evidence of the facts of those crimes to the extent they are relevant to the capital murder charge and otherwise permitted by state law.

The Respondent again acknowledged that Green was challenging (in part) the constitutionality of the capital murder conviction from "his second trial." Pet. App 134a. Nonetheless, the Respondent argued that the state court appropriately dismissed this claim as untimely under the statute of limitations that governed the noncapital convictions from his first trial. Pet. App. 134a. The Respondent also argued that Green was not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) for this claim because the claim, having been dismissed as untimely in state court, was not "properly filed." Pet. App. 135a. The Respondent further disagreed with Green's arguments that the state's procedural rule was inadequate and that there was cause for any default. Pet. App. 135a-138a. On the merits, the Respondent argued only that Green was not prejudiced at his retrial. Pet. App. 139a.

In response, Green challenged the Respondent's assumption that the federal statute of limitations for this claim began to run on the date the *noncapital* charges became final. Pet. App. 141a-142a. That date, if used, would bizarrely have required Green to seek *federal* habeas relief on his capital murder judgment more than two months before the retrial court even imposed sentence and entered its judgment on that charge. Green also argued that with respect to statutory tolling, the appropriate inquiry was whether his state habeas "application" was properly filed, as § 2244(d)(2) specifies and as this Court suggested in *Artuz v. Bennett*, 531 U.S. 4, 9 (2000), not whether each individual claim within the application was properly filed. Pet. App. 145a-146a.

The magistrate judge concluded in his R&R that this claim is not procedurally defaulted because the state court's dismissal did not rest on adequate state law grounds in the unusual circumstances of this case. Pet. App. 44a-46a. Green was represented by the allegedly deficient attorneys continuously throughout the entire state limitation period, and filing a "timely" state

habeas challenge would have required Green to accuse his lawyers of constitutionally deficient performance at the same time he was relying on them to save his life at the retrial. No Virginia court has enforced a habeas statute of limitations for such claims when the allegedly ineffective attorneys were still representing the applicant at trial, and they continued to represent him throughout the entire limitations period. In fact, Virginia allows prisoners to allege ineffective assistance of counsel only in habeas proceedings, *Walker v. Mitchell*, 299 S.E.2d 698 (Va. 1983), a point by which trial counsel's representation presumptively has terminated. A state procedural rule is not "adequate" if it is not firmly established and regularly applied.[11] *See Ford v. Georgia*, 498 U.S. 411, 424-25 (1991). It also is not "adequate" if its enforcement serves no legitimate purpose under the circumstances of the case. *Lee v. Kemna*, 534 U.S. 362, 376-77 (2002); *Reid v. True*, 349 F.3d 788, 805 (4th Cir. 2003). The magistrate judge concluded that Virginia's enforcement of its statute of limitations in Green's case did not rest on adequate state law grounds.[12]

The magistrate judge further determined that there was cause and resulting prejudice for the untimeliness of this claim in state court. Pet. App. 46a-47a. The same appointed lawyers represented Green at both criminal trials and both direct appeals. Counsels' conduct at trial, on the original appeal, at the retrial, and on the second appeal is imputed to the state and constitutes an external impediment that establishes cause. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

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[11] As shown in footnote 7, *supra*, the Virginia Supreme Court did not even apply this statute of limitations consistently within Green's own case.

[12] The magistrate judge made two additional observations regarding the inadequacy of the state's procedural rule. First, because of Green's "unarguably limited mental capacity," he was incapable of discovering trial counsels' error on his own, understanding its consequences, and, if possible, taking timely remedial action *pro se*. Pet. App. 45a. Second, because an allegation of ineffective assistance triggers a statutory waiver of the attorney-client privilege, Green's filing of a "timely" state habeas claim could have jeopardized his ongoing retrial and direct appeal by permitting government attorneys access to privileged information. Pet. App. 45a-46a.

These lawyers knew or should have known that the unappealed *noncapital* convictions and sentences would prejudice Green in one or both phases of his *capital* retrial. Yet during their Sixth Amendment representation of Green they (i) failed to notice an appeal of the noncapital convictions contrary to Green's wishes, (ii) failed to inform Green that they had not appealed those convictions, and (iii) failed to inform Green of any rights or recourse he might have had.

Despite the magistrate judge's determination that the *state* statute of limitations did not bar the federal court from adjudicating Green's claim, he concluded that Green did not satisfy the *federal* statute of limitations in two respects. First, the magistrate judge recognized that this claim, to be timely in federal court, had to qualify for statutory tolling during the 372 days when Green's state habeas petition was pending. He described the relevant Supreme Court law as "muddle[d]," Pet. App. 49a, but ultimately concluded that *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), compelled him to determine on a claim-by-claim basis whether Green's claims qualified for statutory tolling under § 2244(d)(2). He said this single claim did not qualify for statutory tolling because it was not "properly filed." The only reason it purportedly was not "properly filed," however, was that the state court dismissed it as time-barred by applying the very procedural rule the magistrate judge had just found to be inadequate. Pet. App.48a-49a.

Second, even if Green's claim qualified for statutory tolling, the magistrate judge said the pre-tolling interval (from the latest triggering event in § 2244(d)(1) until Green filed his state habeas petition on April 22, 2004) plus the post-tolling interval (from the denial of state habeas relief on April 29, 2005, until filing of the federal habeas petition on December 1, 2005) exceeded one year. Pet. App. 49a-51a. In calculating the pre-tolling interval, the magistrate judge inexplicably ignored Green's argument that the statute of limitations for his challenges to the capital murder judgment started to run on February 23, 2004, when that judgment became

final. He determined that § 2244(d)(1)(B) was the appropriate subsection for this claim, and that the relevant triggering event was the appointment of new state habeas counsel on June 26, 2003 – an event that removed the impediment of Green's ongoing and exclusive representation by trial counsel whose conduct was attributable to the state. Pet. App. 47a-48a. Using this date yielded a pre-tolling interval of 301 days which, when combined with the 216-day post-tolling interval, exceeded one year. The magistrate judge did not consider whether Green was entitled to equitable tolling.

2. Proceedings Before the District Court Judge.

Both parties filed objections to the R&R. The Respondent objected to the magistrate judge's conclusion that the state court's decision did not rest on adequate state law grounds, and to his conclusion that there was cause for Green's failure to comply with the state statute of limitations. The district court overruled these objections. Pet. App. 27a-28a.

Green objected to the magistrate judge's rejection of statutory tolling, his determination of the date when the federal statute of limitations began to run, and his failure to consider equitable tolling. Pet. App. 149a-154a. The district court overruled the first and second objections. Pet. App. 28a-29a. It considered the third objection, equitable tolling, *de novo*. Without deciding whether Green's case presented the extraordinary circumstances necessary for equitable tolling, the court held that Green did not qualify because he was not sufficiently diligent during the pre-tolling period. The court based its conclusion on the proposition that the federal limitation period began to run with the appointment of state habeas counsel on June 26, 2003, but that Green did not file his state habeas petition to stop the clock until April 22, 2004,

nearly ten months later. For this reason, the court denied Green's objection.[13] Pet. App. 29a. Green filed a timely motion to alter or amend the judgment, which the district court denied on May 17, 2007.

F. Appeal to the Fourth Circuit.

The district court *sua sponte* granted a certificate of appealability on Green's claims that (i) defense counsel rendered ineffective assistance in failing to appeal the noncapital convictions, and (ii) Green suffers from mental retardation. Although Green briefed both issues in detail, the Fourth Circuit devoted the bulk of its opinion to the mental retardation claim, on which it affirmed the denial of relief. The court of appeals did not disturb the district court's factual finding that Green has significantly subaverage intellectual functioning, despite the Respondent's urgent plea that it should do so.

On the Sixth Amendment allegation, Green addressed each of the issues presented in this petition for certiorari, acknowledging that this claim was timely only if he qualifies for (1) statutory tolling *and* (2) either a correction of the limitations starting date or equitable tolling. First, Green argued that under the plain language of federal law, the statute of limitations for a claim begins to run on the date the judgment at issue became final. Because Green's claim challenges the capital murder judgment, the statute of limitations began to run on February 23, 2004, when his capital murder judgment became final. Pet. CA4 Br. 62, 66.

Second, Green argued in the alternative that he is entitled to equitable tolling because extraordinary circumstances stood in his way and he was diligent. Pet. CA4 Br. 67-69. The primary extraordinary circumstance was habeas law itself, particularly its prohibition against

[13] Both parties also objected to portions of the magistrate judge's ruling on mental retardation. On *de novo* review, the district court adopted the magistrate judge's analysis in all material respects.

second or successive petitions. Green's relevant claim attacked the constitutionality of his capital murder judgment from the retrial. Virginia law prohibited him from filing more than one habeas petition challenging that judgment: he could not file one petition alleging that his retrial was tainted by counsels' failure to appeal the noncapital convictions, and then, when the capital judgment became final, file a second petition raising his additional challenges to that judgment. Federal law similarly prohibited Green from filing a second or successive petition challenging the same judgment. 28 U.S.C. § 2244(b)(2). This Court's decision last term in *Burton v. Stewart*, 127 S.Ct. 793 (2007), confirms the catastrophic consequences that befall a prisoner who seeks partial habeas relief before his conviction becomes final, and then tries to file another petition challenging the judgment after finality.

Green also argued that when viewed without the distorting effect of hindsight, he pursued his rights diligently. Pet. CA4 Br. 69-71. Until the state court denied Green's habeas petition in 2005, no petitioner or jurist could have anticipated that the state court would dismiss a challenge to his *capital* conviction by applying the limitations period that exclusively governs *noncapital* convictions. Even the Respondent did not foresee or argue this possibility. To the contrary, Va. Code § 8.10-654.1 made quite clear the date by which all of Green's challenges to the capital murder judgment were due. Counsel worked steadily and diligently to meet that deadline, and he had no reason to think circumstances called for extraordinary acceleration. Except for this one claim that the Virginia Supreme Court singled out and treated differently, there has never been any dispute that Green was diligent in meeting the state's habeas filing deadline.

Third, Green argued that the district court erred in denying statutory tolling because § 2244(d)(2) requires the state postconviction "application" to be properly filed, not each separate claim within the application. Pet. CA4 Br. 58-61. Green explained that in *Pace*, the

state court dismissed the applicant's postconviction application in its entirety as untimely. As a result, the Supreme Court had no occasion to decide how to apply § 2244(d)(2) in the very different circumstance where the application as a whole satisfies the state's conditions to filing, but one claim within that application is rejected as untimely.

Green suggested that *Artuz* provides better guidance on this question because its discussion of § 2254(d)(2) notes the difference between an "application," which is the term Congress chose to use in § 2244(d)(2), and a "claim" within the application. *See Carey v. Saffold*, 536 U.S. 214, 229 (2002) (Kennedy, J., dissenting) ("*Artuz* . . . recognized that an 'application' is a 'document' distinct from the legal claims contained within it"). Under *Artuz*, Green's application as a whole was properly filed, but the claim the state court dismissed as untimely would be subject to review under the rules governing procedural default.

Fourth, Green argued that even if § 2244(d)(2) permits examination of whether individual claims were properly filed, it is Kafkaesque to say that the state procedural rule was inadequate and served no legitimate purpose under the circumstances of this case, and yet it was a valid and cognizable requirement of filing that Green had to satisfy. Pet. CA4 Br. 61-62. Green pointed to the Eleventh Circuit's established precedent that a state's procedural rule must be adequate in order to constitute a valid condition of filing under § 2244(d)(2).

In relatively cursory fashion, the Fourth Circuit affirmed the district court's decision that Green's claim is untimely. Like the lower courts, it ignored Green's argument that because his claim challenged the capital murder judgment, the statute of limitations began to run under § 2244(d)(1)(A) when the capital murder judgment became final. Pet. App. 19a. Moving to equitable tolling, the court of appeals cited the governing legal standard and correctly noted that it must review the district court's equitable tolling decision *de novo*. Pet. App. 19a. Its opinion,

however, contains no discussion of extraordinary circumstances, the effect of the prohibition on second or successive petitions, or any purported lack of diligence (except for noting that ten months elapsed between the appointment of state habeas counsel and the filing of the state petition). The court merely said it had reviewed the district court's decision and "[found] no error." Pet. App. 19a.

Viewing equitable tolling as essential to the timeliness of Green's claim, and having just rejected equitable tolling, the court of appeals did not decide whether Green's state habeas claim (or application) was "properly filed." Pet. App. 19a-20a.

Green timely requested rehearing and rehearing *en banc*, which the court of appeals denied on March 11, 2008. Pet. App. 85a. The Respondent then demanded, and the state trial court issued, an order setting Green's execution for May 27, 2008.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Failed to Start the Federal Limitations Period at the Time Mandated by Congress and by This Court's Precedents, and It Departed So Far from an Acceptable Course of Proceeding as To Call for an Exercise of This Court's Supervisory Power.

In AEDPA, Congress imposed a one-year statute of limitations on federal habeas applications brought by state prisoners. That limitations period "shall run from the latest of" four specified events. 28 U.S.C. § 2244(d)(1). One of these events is "the date on which the judgment became final by the conclusion of direct review." § 2244(d)(1)(A). In this statute, the word "judgment" unquestionably refers to the judgment of conviction that is being challenged by the habeas petitioner. The Statement, *supra*, makes clear – with specific references to the record – that this claim consistently has challenged, at least in part, the capital murder judgment, and the Respondent's defenses have addressed, at least in part, the merits of the capital murder judgment.

As used in § 2244(d)(1), a judgment means both a finding of guilt and imposition of sentence. *Burton*, 127 S.Ct. at 799-800. A judgment becomes "final" when "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari ha[s] elapsed." *Teague v. Lane*, 489 U.S. 288, 295 (1989). The term "'direct review' [as used in § 2244(d)(1)(A)] has long included review by this Court." *Lawrence v. Florida*, 127 S.Ct. 1079, 1083 (2007).

The judgment for Green's capital murder conviction indisputably became final on February 23, 2004, when this Court denied his petition for certiorari. Unless there is a *later* date for starting the federal habeas statute of limitations – and there is none in this case – that is the date federal courts must use to determine whether a state prisoner's application for habeas relief was timely filed. That is, in fact, the date the lower courts used for all of Green's challenges to his capital murder judgment, except for the challenge contained in the single claim at issue here.

The Fourth Circuit's failure to use this date is inexplicable. The magistrate judge chose the earlier date of June 26, 2003, based on § 2244(d)(1)(B), and that may have been a reasonable date for starting the limitations period for Green's challenge to his *noncapical* convictions. The magistrate judge never explained why he did not use the later date on which Green's capital murder judgment became final – at least for purposes of determining the timeliness of Green's challenge to the capital murder judgment. The Fourth Circuit wrongly accepted the June 26, 2003, date the magistrate judge had identified. It did so grudgingly, intimating that it might have chosen an even earlier one. Pet. App. 19a (stating that limitation period began to run "*no later than* June 26, 2003, when habeas counsel was appointed for Green") (emphasis in original); *id.* (noting that "[t]he alleged ineffective assistance of counsel . . . occurred in November 2000," as

if to suggest that the date of counsels' misconduct might have started the limitations period).[14]

This claim challenges the constitutionality of Green's conviction for capital murder at the retrial, and it always has done so, at least in part. Green challenged the capital murder conviction when he presented this claim in his state habeas petition; he challenged that conviction in his federal habeas petition. His pleadings and appellate briefs all have included the argument that because he is challenging that conviction, the statute of limitations for this claim began to run on February 23, 2004, when his conviction became final. The Fourth Circuit's failure to start the limitations period for this claim on the date the capital conviction became final – the same starting date it applied to every other challenge to the capital murder conviction and the date clearly mandated by Congress – is indefensible and warrants the Court's summary correction.

Using the correct starting date, Green filed his state petition only 60 days after the limitations period began to run. If he is entitled to statutory tolling for one of the reasons discussed below, this claim (like all of Green's other claims challenging the capital murder judgment) was timely, and the Fourth Circuit egregiously erred in dismissing it as time-barred.

II. In the Alternative, the Court Should Determine Whether Green Qualifies for Equitable Tolling.

If the Court corrects the Fourth Circuit's error in the starting date for the statute of limitations, the question of equitable tolling becomes moot. Absent such a correction, the Court should determine whether the circumstances entitle Green to equitable tolling.[15]

The Fourth Circuit denied relief on the sole ground that Green needed, but did not qualify

[14] This Court never has held that the date of trial counsel's misconduct is relevant to determining the starting point for running the habeas limitations period, and in practice it would be unworkable to do so.

[15] The Court has assumed, but not yet decided, whether § 2244(d)(1) allows for equitable tolling. *Lawrence*, 127 S.Ct. 1085. The Fourth Circuit recognizes equitable tolling for § 2244(d)(1). *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (en banc).

for, equitable tolling. To the extent equitable tolling is at issue, "a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 514. Both elements call for an individualized examination of the facts because "[t]he virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule." *Rotella v. Wood*, 528 U.S. 549, 561 (2000). Despite the case-specific character of this inquiry, the Court has granted certiorari repeatedly to consider, in conjunction with other closely related issues, whether a litigant qualifies for equitable tolling.

A. Green's Case Presents the Kind of Extraordinary Circumstances the Court Previously Has Indicated Will Provide a Basis for Equitable Tolling.

The Court has suggested a broad range of circumstances in which equitable tolling may be available. *See, e.g., Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990) (recognizing availability of equitable tolling where complainant was induced or tricked by his adversary's misconduct into allowing filing deadline to pass); *Rotella*, 528 U.S. at 561 (indicating availability of equitable tolling where a RICO pattern remains obscure despite plaintiff's diligence in seeking to identify it). Particularly relevant here is the Court's recognition that equitable tolling may be available when a litigant cannot satisfy competing statutes or legal requirements. In *Lawrence*, for example, the Court held that statutory tolling under § 2244(d)(2) ends with the postconviction judgment of the state's highest court; it does not include the time for certiorari to review that judgment. The Court acknowledged that its decision could create an anomaly if the state's highest court granted the prisoner postconviction relief and this Court awarded the respondent's petition for certiorari and reversed. Until the Court issued its opinion in such a case, the petitioner would lack standing to file a federal habeas petition (because he won in state court), but as soon as the Court reversed the state court's judgment, the petitioner

would be time-barred from filing a federal petition (because the federal statute of limitations would have expired during certiorari proceedings). The Court indicated that in such circumstances, equitable tolling may be available. *Lawrence*, 127 S.Ct. at 1085.

Green's circumstance is analogous. The competing statutes in his case were the laws forbidding second or successive habeas petitions on the one hand, and the statutes of limitation on the other. As noted in the Statement, *supra*, if Green had "timely" filed a state habeas petition alleging that the capital murder retrial was tainted by counsels' failure to notice an appeal of the noncapital convictions, this would have foreclosed Green's opportunity to present additional state habeas challenges to the capital murder judgment once that judgment became final. If Green's state habeas counsel waited until the capital murder judgment became final, as he did, and presented this ineffective assistance claim along with Green's other timely challenges to that judgment, Green would be branded as dilatory.

This extraordinary situation exists solely because the Virginia Supreme Court applied the noncapital statute of limitations to one (and only one) of Green's challenges to the constitutionality of his capital judgment. The state court had never done so before, and it has not done so since. This is clearly the kind of extraordinary circumstance for which equitable tolling is available.

B The Court Should Clarify the Standards that Govern an Assessment of Diligence, and Should Correct the Fourth Circuit's Fundamentally Flawed Analysis.

The district court correctly observed that ten months elapsed between the appointment of Green's state habeas counsel on June 26, 2003 – which it deemed to be the beginning of the federal limitation period under § 2244(d)(1)(B) – and the filing of his state habeas petition on April 22, 2004. It cited this lapse of time as the sole basis for concluding that Green was not

diligent and was not entitled to equitable tolling. The Fourth Circuit effectively adopted this analysis, stating that it had reviewed the district court's decision and found no error. Pet. App. 19a. Facts that the Fourth Circuit ignored show there was no lack of diligence.

First, the first eight months of this ten-month interval cannot reasonably be counted as a period when Green was dilatory. State habeas counsel was appointed on June 26, 2003, but Green's capital murder judgment did not become final until eight months later on February 23, 2004. Although a criminal defendant is not foreclosed from filing a *federal* habeas petition before the judgment in his case becomes final, *see Burton*, 127 S.Ct. at 799, Green has located no Virginia court decision that recognizes a criminal defendant's right to file a *state* habeas petition before the judgment he challenges has become final.[16] Even if state law hypothetically would have allowed Green to file a premature petition, and even if Green had been willing to bear the significant risks of doing so, *see Burton*, Green is unaware of any authority holding that a criminal defendant can be found to dilatory for purposes of equitable tolling because he failed to file a habeas petition ***before the judgment even had become final on the challenged offense***.

If the eight months before Green's capital judgment became final are equitably tolled, his federal petition was timely. The remaining 60 days of the pre-tolling interval and the 216 days of the post-tolling interval add up to less than one year.[17]

Second, diligence is contextual. Until the state court's final decision dismissing Green's habeas petition, no jurist or applicant could have foreseen that the Virginia Supreme Court would

[16] As noted in the Statement, *supra*, a criminal conviction becomes final under Virginia law at an earlier point than under federal law, except in capital cases. Prior to the date of finality, challenges to a noncapital conviction or sentence must be brought by direct appeal or in a post-trial motion to strike the evidence, to set aside the verdict, to enter a judgment of acquittal, or to grant a new trial. *See* Va. Sup. Ct. R. 3A:15.

[17] The district court did not find any lack of diligence during the post-tolling interval, and the Fourth Circuit did not disturb that decision.

dismiss a challenge to Green's *capital* conviction by applying to it the statute of limitations that exclusively governs *noncapital* convictions. The state court had never done that before, the Respondent did not make such an argument in opposing Green's state habeas petition, and the text of state habeas law distinguishes clearly between the limitations periods that are supposed to apply to capital and noncapital convictions. *See* Va. Code §§ 8.01-654 and 8.01-654.1.

In this context, Green was not dilatory. State habeas counsel began working on Green's case shortly after he was appointed, he progressed steadily and reasonably,[18] and he filed a petition that fully complied with the state statute of limitations for capital cases. He had no notice whatsoever that extraordinary diligence was required with respect to one (and only one) of Green's challenges to the capital murder conviction. If counsel's conduct can be characterized as dilatory, it is only by looking at it through the distorting lens of hindsight.

Third, to the extent a criminal defendant in other circumstances might be expected to discover and prosecute this Sixth Amendment violation on his own or bring it to his lawyer's attention, Green cannot be faulted for a lack of diligence. The district court correctly found that Green was not capable of discovering trial counsels' error on his own or doing anything about it because of his significantly diminished intellectual functioning, *see supra* footnote 12; *see generally Powell v. Alabama*, 287 U.S. 45, 69 (1932) (recognizing *pro se* litigation limitations of "those of feeble intellect"). This Court has assumed, but not decided, that mental capacity is relevant to equitable tolling. *Lawrence*, 127 S.Ct. at 1086.

If counsel acted diligently under the circumstances and Green is eligible for equitable tolling, his federal habeas claim is timely – if he also qualifies for statutory tolling. The two

[18] A note in state habeas counsel's file shows, for example, that he first discovered on or around November 21, 2003, that no notice of appeal had been filed for Green's noncapital convictions. Habeas counsel wrote to trial counsel on December 1, 2003, to inquire about the reason they had not filed an appeal. J.A.3434. Habeas counsel's file contains no response to the letter.

important and unresolved issues relating to statutory tolling are discussed below.

III. This Case Presents Important Issues of General Applicability Concerning the Availability of Statutory Tolling That Merit the Court's Attention.

By failing to use the correct limitations period and concluding that Green did not qualify for equitable tolling, the Fourth Circuit avoided addressing two important issues concerning statutory tolling. As a result, it may be most appropriate for this Court to remand the statutory tolling issues to the court of appeals. Because those issues ultimately must be resolved by this Court, however, and because the peculiar posture of Green's case makes it an unusually good vehicle for addressing those issues, the Court may prefer to decide those questions now for reasons noted here.

A. The Lower Courts Need Clear Guidance on Whether a Procedural Rule Can Be a Valid Condition to Filing a State Application If That Rule Has Been Determined Not to Rest on Adequate State Law Grounds.

1. The Lower Courts Are in Disagreement.

The magistrate judge and district court agreed that Virginia's statute of limitations for noncapital habeas cases did not rest on adequate state law grounds in Green's case. Nonetheless, they concluded that Green's failure to comply with that same statute of limitations meant his application was not "properly filed." This ruling directly conflicts with the Eleventh Circuit's logical and well-developed position – which Green advocated below – that a procedural rule must be "adequate" in order to constitute a valid condition to filing for purposes of § 2244(d)(2). In its seminal case, the Eleventh Circuit reasoned as follows:

> The aims of comity and federalism that animate both AEDPA and the doctrine of procedural default favor deference toward state procedural rules only when their consistent application demonstrates the state's real reliance on them as a means to the orderly administration of justice. Accordingly, we conclude that a rule governing filings must be "firmly established and regularly followed" before noncompliance will render a petition improperly filed for the purpose of AEDPA's tolling provision.

Siebert v. Campbell, 334 F.3d 1018, 1025 (11th Cir. 2003) (internal citations and parentheticals omitted), *rev'd on other grounds*, *Allen v. Siebert*, 128 S.Ct. 2 (2007) (per curiam).[19] Even today, the Eleventh Circuit continues to adhere firmly to this tenet: if the state court dismisses an application by invoking a procedural rule that is not adequate, the rule is not a valid condition to filing. *See, e.g., Colbert v. Head*, 146 Fed. Appx. 340, 344 (11th Cir., Aug 16, 2005); *Sykorsky v. Crosby*, 187 Fed. Appx. 953, 958, n.3 (11th Cir. 2006); *Neal v. Secretary, Department of Corrections*, 2008 WL 833915 at * 2 (11th Cir. March 28, 2008).[20]

In an opinion concurring in the judgment in *Evans v. Chavis*, 546 U.S. 189 (2006), Justice Stevens similarly suggested that "application of AEDPA's tolling provision is analogous to the question whether denial of a state postconviction petition rested upon an adequate and independent state ground." *Id.* at 206. This lends additional weight to the validity of the Eleventh Circuit's rule.

The contrary position – advocated by the Respondent below – is that specific language in *Pace* makes the adequacy of the state procedural rule immaterial to the application of § 2244(d)(2): "What we intimated in *Saffold* we now hold: When a postconviction petition is

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[19] The Court's *per curiam* reversal in *Siebert* does not address, and does not undermine, the portion of the Eleventh Circuit's decision on which Green relies. The words "adequate" and "firmly established" do not appear in this Court's opinion. Rather, in *Siebert*, the Eleventh Circuit found that the "jurisdictional nature" of the procedural bar at issue was not firmly established at the relevant time. This Court reversed the Eleventh Circuit because the question of whether a state's timeliness rule is jurisdictional or is subject to exceptions is immaterial to the question of whether a state application was "properly filed." Notably, unlike in Green's case, the procedural rule at issue in *Siebert* has been found to be adequate under this Court's precedents. *Hurth v. Mitchem*, 400 F.3d 857 (11th Cir. 2005).

[20] The Eleventh Circuit's rule is based on *Ford* inadequacy while Green's case involves *Lee* inadequacy. In Green's view, the distinction between species of inadequacy is not material to the question presented. If this is a debatable question, however, it simply indicates further the need for this Court to address and clarify the issue.

untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Pace*, 544 U.S. at 414.

Although this position does not rise to the level of a split in the circuits, it has been explained most cogently as follows:

> Thus for purposes of federal limitations tolling purposes, and specifically, whether a state petition was properly filed, respondent bears no burden of showing that the state law was adequate and consistently applied as he would in the separate procedural bar analysis. The state court's finding is "the end of the matter." The purpose of the AEDPA limitations is to prevent the stale filing of federal petitions; the concept of procedural bar is based on deference to independent state procedural grounds to bar review on the merits. . . . While both concepts may be ultimately based on comity, they are analyzed separately.

Foley v. Evans, 2006 WL 191946 at *2 n.4 (E.D. Cal. Jan. 19, 2006) (quoting *Pace*).

Whether this result is what the Court intended in *Pace* is uncertain. On the one hand, many conditions to filing – the form of the document, the court where it must be lodged, and the requisite filing fee, *see Artuz*, 531 U.S. at 8 – have no bearing on whether the petition will be stale when presented in state court. Moreover, the close relationship between inadequacy and caprice may raise due process concerns if federal courts must defer to state action that is arbitrary or, in a particular case, serves no legitimate purpose. On the other hand, when this Court said, "'that [is] the end of the matter' for purposes of § 2244(d)(2)," *Pace*, 544 U.S. at 414, it may have intended to foreclose all efforts to look behind the state's procedural rules, regardless whether there appear to be compelling circumstances for doing so.

2. Green's Case Presents the Issue Cleanly.

Although habeas petitioners regularly ask lower courts to apply the *Siebert* rule, few of these cases present the issue in a context that is appropriate for this Court's review. Federal courts frequently conclude that the state's procedural rule rests on adequate state law grounds, obviating the need to decide how § 2244(d)(2) would apply if the rule were inadequate. *See,*

e.g., Walker v. Norris, 436 F.3d 1026, 1031 (8th Cir. 2006) (rejecting prisoner's legal argument after concluding that state court regularly enforces its rule requiring verification of state applications); *Boyle v. Norris*, 2006 WL 3431897 at *3 n.5 (E.D. Ark. Nov 29, 2006) (declining to decide whether to follow *Siebert* because state's procedural rule was firmly established and regularly applied). Lower court decisions also may rest on alternative grounds, either of which could entitle the prisoner to statutory tolling. In *Jenkins v. Johnson*, 330 F.3d 1146 (9th Cir. 2003), for example, the court held that the state's procedural rule was inadequate under § 2244(d)(2), but also determined that the rule at issue imposed a condition to relief rather than a condition to filing.

The context of Green's claim is appealingly simple and straightforward . The state court dismissed this claim for just one reason: that it was "barred by Virginia Code § 8.01-654(A)(2)," which is a statute of limitations. The magistrate judge and district court both made judicial findings that in *this* case, enforcement of that statute of limitations did not rest on adequate state law grounds. Nonetheless, they concluded that Green's claim was not properly filed under § 2244(d)(2) because he failed to comply with that very same statute of limitations. This context makes Green's case an ideal one in which to resolve the substance of this issue.

B. This Court Has Spoken with Two Voices on Whether It Is the Application – or Each Individual Claim within the Application – that Must Be "Properly Filed" To Satisfy § 2244(d)(2).

The Court spoke to this issue in both *Artuz* and *Pace*, appearing to point in opposite directions. In *Artuz*, the state postconviction court rejected all the claims in the prisoner's application on grounds of procedural default. The district court refused to allow statutory tolling, reasoning that if the claims were procedurally defaulted in state court, they could not have been "properly filed." Writing for a unanimous Court, Justice Scalia cautioned that such an analysis

would improperly "elide the difference between an 'application' and a 'claim.'" *Artuz*, 531 U.S. at 9.

> Ignoring this distinction would require judges to engage in verbal gymnastics when an application contains some claims that are procedurally barred and some that are not. Presumably a court would have to say that the application is "properly filed" as to the nonbarred claims, and not "properly filed" as to the rest. The statute, however, refers only to "properly filed" applications and does not contain the peculiar suggestion that a single application can be both "properly filed" and not "properly filed." Ordinary English would refer to certain *claims* as having been properly *presented* or *raised*, irrespective of whether the application containing those claims was properly filed.

Id. at 10 (emphasis in original). Under *Artuz*, a petitioner's state application would be deemed "properly filed" (or not) based on the document as a whole, even if it contained a claim that the state court found to be time-barred.

Without purporting to overrule *Artuz,* this Court suggested the opposite in *Pace*. As in *Artuz*, the state postconviction court had dismissed the prisoner's application in its entirety. The state application was untimely, and it did not satisfy any of the exceptions to the state's statute of limitations. Pace argued in federal court that because the state court had to perform a claim-by-claim examination of timeliness *after* the petition was filed, compliance with the statute of limitations could not be a condition to filing. This Court rejected the argument and denied statutory tolling, reasoning as follows:

> Petitioner also argues that, because § 2244(d)(2) refers to a "properly filed *application,*" then any condition that must be applied on a claim-by-claim basis, such as Pennsylvania's time limit, cannot be a "condition to filing." (Emphasis added.) Section 2244, however, refutes this position. Section 2244(b)(3)(C), for example, states that the court of appeals "may authorize the filing of a second or successive *application* only if it determines that the *application* makes a prima facie showing that the *application* satisfies the requirements of this subsection." (Emphases added.) Yet the "requirements" of the subsection are not applicable to the application as a whole; instead, they require inquiry into specific "claim[s]." See § 2244(b)(2)(A) ("claim" relies on a new rule made retroactive); § 2244(b)(2)(B) ("claim" with new factual predicate). In fact, Petitioner's argument is inconsistent with § 2244(d)(2) itself, which refers not just to a

> "properly filed application," but to a "properly filed application . . . *with respect to the pertinent judgment or claim*." (Emphasis added.)

Pace, 544 U.S. at 415-16 (internal footnote omitted; ellipses added in *Pace*). The Court did not explain the contextual significance of the phrase "with respect to the pertinent judgment or claim."[21] Under *Pace*, as the district court interpreted it in Green's case, applications must be reviewed on a claim-by-claim basis, and each individual claim must be "properly filed" in order to qualify for statutory tolling in federal court.

As *Artuz* and *Pace* show, the issue presented here has arisen most frequently in hypothetical circumstances. In both of those cases, the state court did not treat some claims as properly filed and others – presented in the same application and challenging the same judgment – as not. In none of these cases did this Court allow statutory tolling for some claims and deny it for others. The same is true for every other case in which the Court has addressed the scope or meaning of the term "properly filed." *See Siebert, supra; Evans, supra; Carey, supra;*; *Duncan v. Walker*, 533 U.S. 167 (2001). Green's case, by contrast, presents the circumstance that was merely hypothesized in *Artuz* and *Pace.* As a result, it offers the cleanest opportunity the Court is likely to encounter for resolving this issue.

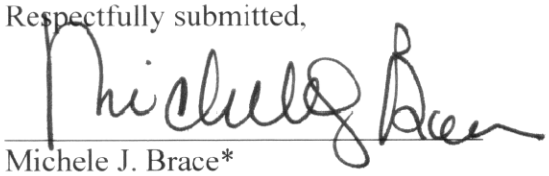
CONCLUSION

The Court should grant certiorari and summarily correct the Fourth Circuit's failure to start the limitations period at the time mandated by Congress and by this Court's prior decisions; in the alternative, it should grant certiorari to address the issue of equitable tolling. The Court should grant certiorari to resolve the remaining important and interrelated issues of statutory

[21] In its most natural reading, this phrase means that if the prisoner has filed multiple state applications because he has accumulated convictions for a number of unrelated crimes, he qualifies for statutory tolling only during the pendency of the state applications that challenge "the pertinent judgment or claim" that is the subject of the federal habeas petition; he does not obtain statutory tolling for the pendency of an application that challenges a different judgment.

tolling, or it should remand this case to the Fourth Circuit to address those issues in the first instance.

Respectfully submitted,



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No. 07-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2007

KEVIN GREEN,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

Certificate of Service

I certify that I am a member of the Bar of this Court; that I am counsel for Kevin Green; that on May 19, 2008, I caused the foregoing Motion for Leave To Proceed *In Forma Pauperis*, and Petition for a Writ of Certiorari, and Appendix thereto to be served by electronic and first-class mail on Matthew P. Dullaghan, Senior Assistant Attorney General, 900 East Main Street, Richmond, VA 23219, telephone (804) 786-2071; mdullaghan@oag.state.va.us.

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