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AEDPA Statute of Limitations: Is It Tolled When the United States Supreme Court Is Asked to Review a Judgment from a State Post-Conviction Proceeding

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AEDPA STATUTE OF LIMITATIONS: IS IT TOLLED WHEN THE UNITED STATES SUPREME COURT IS ASKED TO REVIEW A JUDGMENT FROM A STATE POST-CONVICTION PROCEEDING?

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The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[2] created, among other things, an elaborate set of procedural rules and limits on state prisoners seeking federal habeas corpus review. As Justice O'Connor noted, the AEDPA represented "a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus. . . ."[3] This new constraint affects both the procedural and substantive requirements for federal habeas petitions. Whatever the merits of Congress's decision to constrain the timing and circumstances for obtaining federal habeas relief,[4] the procedural rules have created numerous traps for the unwary. Even the Supreme Court has been critical of the manner in which the AEDPA was drafted, commenting, "[I]n a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting."[5] The poor drafting amplifies the problems that confront *pro se* petitioners.[6] As one *pro se*

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[2]Pub. L. No. 104-132, § 735, 110 Stat. 1214 (1996).

[3]Williams v. Taylor, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring).

[4]For discussions of the relative merits of the AEDPA, see, e.g., Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337 (1997); Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477 (1996); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996); *see also* Ankush Agarwal, Comment, *Obstructing Justice: The Rise and Fall of the AEDPA*, 41 SAN DIEGO L. REV. 839 (2004) (addressing antiterrorism aspects of the AEDPA).

[5]Lindh v. Murphy, 521 U.S. 320, 336 (1997).

[6]The vast majority of federal habeas corpus petitions are brought by inmates acting *pro se*. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 191(2001) (Breyer, J., dissenting) (noting a study indicating that 93% of federal habeas petitions were filed *pro se* (citing Federal Habeas Corpus Review 14)). Nonetheless, the new procedures outlined in the AEDPA are often so imprecise or confusing they present difficult interpretive questions not only for *pro se* litigants, but for attorneys and the courts as well.

petitioner described it, in the course of attempting to pursue federal habeas relief, he had "been confronted with 'an unfortunate minefield of conflicting statutes, circuits, linguistics, and mindsets.'"[7]

Prior to the enactment of the AEDPA, no statute of limitations applied to federal habeas petitions. A federal habeas petition could be filed at any time after the state conviction, provided the petitioner remained in custody.[8] The only pure timing-related defense arose only from a state's assertion of the equitable doctrine of laches. One of the more dramatic changes implemented in the AEDPA was the creation of a one-year limitations period for seeking federal habeas corpus relief.[9] The year runs from the later of several dates, including, when "the judgment [becomes] final by the conclusion of direct review,"[10] or when "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."[11] The AEDPA limitations period, with its accompanying tolling provision,[12] was intended, among other things, to "promote[] the exhaustion of state remedies while respecting the interest in the finality of state court judgments."[13]

The AEDPA reiterated the strict exhaustion requirements that were codified in 1948.[14] Exhaustion refers to the petitioner's obligation to first give the state courts

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[7]Miller v. Dragovich, 311 F.3d 574, 577 (3d Cir. 2002).

[8]Judicially created exhaustion doctrines provided timing requirements only to the extent that they required that the federal petition be filed *after* the issues had been litigated in state court. *See infra* notes 13-15 and accompanying text. There was no express limit, however, on how long after the conviction those steps had to occur.

[9]28 U.S.C. § 2244(d)(1) (2000). Because no limitations period applied before 1996, most courts have held that those prisoners whose convictions were final on April 24, 1996, the day the AEDPA was enacted, had one additional year after that to file their habeas petitions. *See, e.g.*, Gaskins v. Duval, 183 F.3d 8, 9 (1st Cir. 1999); Ross v. Artuz, 150 F.3d 97 (2d Cir. 1998); Burns v. Morton, 134 F.3d 109 (3d Cir. 1998); Brown v. Angelone, 150 F.3d 370 (4th Cir. 1998); Flanagan v. Johnson, 154 F.3d 196 (5th Cir. 1998); Brown v. O'Dea, 187 F.3d 572, 577 (6th Cir. 1999), *overruled on other grounds*, 530 U.S. 1257. (2000); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997); Nichols v. Bowersox, 172 F.3d 1068 (8th Cir. 1999); Patterson v. Stewart, 251 F.3d 1243 (9th Cir. 2001); Miller v. Marr, 141 F.3d 976 (10th Cir. 1998); Wilcox v. Fla. Dep't of Corr., 158 F.3d 1209 (11th Cir. 1998). While the United States Supreme Court never expressly addressed this issue, the question largely has become moot. By now—nearly ten years after the effective date of the AEDPA—few, if any, petitions based on pre-AEDPA convictions would not be time barred even with the one-year grace period.

[10]28 U.S.C. § 2244(d)(1)(A).

[11]*Id.* § 2244(d)(1)(D).

[12]*Id.* § 2244(d)(2).

[13]Carey v. Saffold, 536 U.S. 214, 220 (2002) (quoting *Duncan*, 533 U.S. at 178).

[14]The exhaustion requirement in the AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted unless* it appears that—
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(i) there is an absence of available State corrective process; or
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

the opportunity to address any constitutional problems before seeking review in federal court with a habeas corpus petition.[15] To facilitate exhaustion, to prevent parallel litigation of the same claims in state and federal court, and in the interest of fairness, the AEDPA provides that the limitations period is tolled while the petitioner seeks state post-conviction relief.[16]

Several traps for the unwary arise from the imprecise language of the tolling provision:

> 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.[17]

This thiry-seven word provision has been construed by the United States Supreme Court three times since 1996,[18] and yet several questions remain unanswered. One such unanswered question is whether tolling occurs when a petitioner files a petition for writ of *certiorari* to the United State Supreme Court from the state court post-conviction decision. In other words, does seeking the United States Supreme Court's review from a state court's final decision on an "application for State post-conviction or other collateral review" keep the state post-conviction application "pending?" That is the question this article will address, and ultimately answer in the affirmative.

Exhausting state remedies is frequently an arduous, time-consuming task. Unlike claims raised on direct appellate review, which are limited to the facts apparent in the appellate record, claims raised on post-conviction review require additional investigation. For example, in most jurisdictions, claims of ineffective assistance of trial counsel are raised in a post-conviction proceeding.[19] Such claims require factual

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28 U.S.C. § 2254(b)(1) (emphasis added). The AEDPA did not make any substantive changes to the previous exhaustion provision of 28 U.S.C. § 2254(b); *see also* Rose v. Lundy, 455 U.S. 509, 515-16, 518 n.9 (1982) (describing pre-AEDPA history of exhaustion principles).

[15]*See* O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("[E]xhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. . . ."); *Rose*, 455 U.S. at 518 (finding that the exhaustion requirement "is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings").

[16]28 U.S.C. § 2244(d)(2). *See, e.g.*, Smaldone v. Senkowski, 273 F.3d 133, 136 (2d Cir. 2001) (stating that tolling per § 2244(d)(2) "support[s] the federal interest in comity and finality of state court judgments. . ."), *cert. denied*, 535 U.S. 1017 (2002).

[17]28 U.S.C. § 2244(d)(2).

[18]*Saffold*, 536 U.S. at 220; *Duncan*, 533 U.S. at 191; Artuz v. Bennett, 531 U.S. 4 (2000); *see also* Clay v. United States, 537 U.S. 522 (2003) (interpreting part of the statute of limitations applicable to petitions filed pursuant to 28 U.S.C. § 2255).

[19]*See* Massaro v. United States, 538 U.S. 500, 503-08 (2003). The Supreme Court recently held that, at least in federal cases, the better practice is for ineffective assistance of trial counsel to be raised in a post-conviction proceeding (there a 28 U.S.C. § 2255 petition) to ensure adequate development of the record necessary for deciding the claim. *See Massaro*, 538 U.S. 500. When a state requires ineffectiveness claims to be raised on direct appeal, it must provide some meaningful mechanism for developing the record for reviewing the claim, or the state may not rely on procedural bar rules when the state inmate later seeks to have the

investigation to develop the evidence necessary to demonstrate what counsel did *not* do, and the reasons for counsel's actions or lack thereof.[20] Even when the inmate has the assistance of counsel for preparing the state post-conviction petition, the information gathering process takes time. Without counsel, the inmate can only conduct the investigation by relying on what help he or she can get from friends and family on the outside, and what he or she can accomplish by letters from prison. Moreover, securing information and assistance from the trial counsel whose performance is in question is a difficult, delicate matter even for post-conviction counsel; for the inmate it may be next to impossible. Similar difficulties are presented when investigating potential *Brady*[21] claims or other claims that must be raised in the post-conviction review setting.

Once the factual investigation is completed, the legal research and drafting process must take place. Again, the *pro se* prisoner with limited access to the prison's legal resources, with little or no experience in drafting legal pleadings, and at the mercy of prison personnel when sending or receiving legal documents, faces substantial obstacles that will draw out the post-conviction petition preparation and filing process. Because tolling of the federal habeas limitations period does not begin until the state post-conviction petition is "properly filed," it is easy to see how, with or without counsel, investigation, research, and drafting the initial state post-conviction petition can eat up the better part of the one year limitations period. After the state inmate exhausts his state post-conviction claims in the state courts, the time remaining of the limitations period usually is not long enough to also seek *certiorari* from the United States Supreme Court (and have the *certiorari* petition considered) before the time to file the habeas petition runs out.

A leading treatise on federal habeas corpus practice suggests the following:

> Typically, a prospective federal habeas corpus petitioner should not file a petition until after completing nine prior litigative steps: (1) the guilt trial, (2) the sentencing hearing, (3) proceedings on a motion for new trial, (4) appeals as of right within the state courts, (5) discretionary appeals within the state courts, (6) *certiorari* review in the United States Supreme Court of the determination on appeal, (7) state postconviction proceedings on all available and not theretofore fully litigated state and federal claims, (8) all available state post conviction appeals, and, depending on the circumstances, (9) *certiorari* review in the United States Supreme Court of the state postconviction proceedings.[22]

If a purpose of the tolling provision is to permit the prisoner to take advantage of other available remedies, then the limitations period would not run during any of

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ineffectiveness claim considered by a federal court in a habeas petition. *See* Kimmelman v. Morrison, 477 U.S. 365 (1986).

[20]Trial counsel's strategic decisions are given considerable deference when reviewed in an ineffective assistance claim. *See* Strickland v. Washington, 466 U.S. 668, 689-91(1984). To overcome the presumption that counsel acted with reasonable professional judgment, the petitioner must show the reasons for counsel's judgments or lack thereof. *Id.*

[21]Brady v. Maryland, 373 U.S. 83 (1963).

[22]1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §5.1, 213 (Lexis Law Publ'g 3d ed. 1998).

these litigative steps. The statute of limitations begins upon the completion of direct review,[23] so it does not even begin to run until the after first six steps are taken.[24] Steps seven and eight clearly fall within the tolling provision of § 2244(d)(2). The caveat to step nine, that *certiorari* review may be sought "depending on the circumstances," reflects the concern that "employment of the *certiorari* remedy in advance of federal habeas corpus review may be advantageous in some situations but may pose a risk of severely impeding the prisoner's ability to prepare and file a federal habeas corpus petition within the limitations period set by the [AEDPA]."[25] That risk arises because the courts have not uniformly decided whether the pendency of such a *certiorari* petition tolls the limitations period pursuant to § 2244(d)(2).

Numerous habeas petitions have been dismissed as time barred when petitioners counted on tolling while they pursued or could have pursued *certiorari* review from the United States Supreme Court of the state court post-conviction decision.[26] The circuit courts have been far from consistent on this issue. For example, the Third Circuit first suggested that tolling occurred if a *certiorari* petition was filed.[27] As the other circuits fell in line in support of the opposing position,[28] the Third Circuit altered its position and decided to follow the others.[29] At about that same time, the Sixth Circuit, which previously held that the tolling provision did not apply,[30] chose to part company with its sister circuits and concluded that when such a petition for

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[23]*See* 28 U.S.C. § 2244(d)(1)(A).

[24]*See id.* States set varying time limits for filing motions for new trial, so step three, the proceedings on the motion for new trial, may not always be conducted as part of direct review; in any event, they would be proceedings seeking post-conviction or other collateral review, and would thus fall within the tolling provision of § 2244(d)(2).

[25]LIEBMAN & HERTZ,, *supra* note 22, §6.4(a), 263..

[26]*See, e.g.*, *Miller*, 311 F.3d at 580; White v. Klitzkie, 281 F.3d 920, 924-25 (9th Cir. 2002); Crawley v. Catoe, 257 F.3d 395, 399 (4th Cir. 2001), *cert. denied sub nom*. Crawley v. Maynard, 534 U.S. 1080 (2002); Snow v. Ault, 238 F.3d 1033 (8th Cir. 2001), *cert. denied*, 532 U.S. 998 (2001); Stokes v. Dist. Att'y of County of Phila., 247 F.3d 539 (3d Cir. 2001), *cert. denied*, 534 U.S. 959(2001); Coates v. Byrd, 211 F.3d 1225 (11th Cir. 2000), *cert. denied*, 531 U.S. 1166 (2001); Isham v. Randle, 226 F.3d 691 (6th Cir. 2000), *cert. denied*, 531 U.S. 1201 (2001), *overruled en banc by* Abela v. Martin, 348 F.3d 164 (6th Cir. 2003); Steed v. Head, 219 F.3d 1298 (11th Cir. 2000); Ott v. Johnson, 192 F.3d 510 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000); Rhine v. Boone, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000).

[27]Morris v. Horn, 187 F.3d 333, 336-37 (3d Cir. 1999). In *Morris*, the court mentioned that the statute of limitations for the prisoner's federal habeas corpus petition did not begin to run until the Supreme Court denied *certiorari* review of the Pennsylvania Supreme Court's decision on the prisoner's first post-conviction petition. *Id.* The issue regarding the statute of limitations, however, had not been raised specifically in that case.

[28]*See* cases cited *supra* note 26

[29]*Miller*, 311 F.3d at 579.

[30]*Isham*, 226 F.3d at 692.

certiorari could be or actually has been filed, the limitations period is tolled.[31] Throughout these transitions, the United States Supreme Court has consistently declined to grant *certiorari* in any case in which it could resolve this issue.[32]

Without tolling, a significant limitation is imposed on a federal habeas petitioner's right to take advantage of other avenues of redress for constitutional violations. In particular, the petitioner may be effectively foreclosed from the right to seek *certiorari* review in the United States Supreme Court from a decision made in a state post-conviction proceeding. While a state inmate is not legally prohibited from seeking *certiorari* following the final state court decision on the state post-conviction petition, seeking *certiorari* is, as a practical matter, difficult, if not impossible. Depending on when in the Court term a petition for *certiorari* is filed, it can take several months for the Court to issue an order granting or denying *certiorari*.[33] In many cases, without tolling, the time it takes to prepare and file the petition,[34] and for the Court to consider it, will run out the one-year limitation period. The state inmate is confronted with two choices: (1) forego seeking *certiorari* review from the Supreme Court, and concentrate on getting the federal habeas petition prepared and filed before the limitations period runs out, or (2) file the *certiorari* petition, but be prepared to file the federal habeas petition while the *certiorari* petition is still pending. Thus, even when the lack of tolling does not entirely eliminate the possibility of *certiorari* review, it encourages concurrent litigation of the same issues in the United States Supreme Court and a federal district court.[35] Not only is such concurrent litigation inconsistent with concerns about judicial economy and efficiency, for a *pro se* inmate litigant, for whom limited prison resources make working on a single legal proceeding a difficult task, working on two simultaneously may be too much to ask.

The Supreme Court has had four occasions to address the language and construction of §2244(d)(2)'s tolling provision. In *Duncan v. Walker*, the Court held that the word "State" in the phrase "a properly filed application for *State* post-conviction or other collateral review with respect to the pertinent judgment or claim," modifies both "post-conviction" and "other collateral review."[36] As a result, the limitations period was not tolled during the pendency of a *federal* habeas petition

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[31]Abela v. Martin, 348 F.3d 164 (6th Cir. 2003) (en banc), *cert. denied sub nom*. Caruso v. Abela, 541 U.S. 1070 (2004). The Sixth Circuit took many of its cues from a dissenting opinion in the Ninth Circuit. *See White*, 281 F.3d at 926-29 (Berzon, J., dissenting).

[32]*See* cases cited *supra* notes 26, 31.

[33]Ordinarily, a petition is acted upon "approximately eight weeks after it has been filed, or about three to four weeks after the brief in opposition is filed." That period may be shortened if the respondent waives the right to file a brief in opposition, or it may be lengthened if the respondent is given an extension for filing the brief. Petitions filed just before or during the summer recess may take even longer; ordinarily, action on such petitions is "deferred until the Court meets again in late September." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 88 (8th ed. 2002) [hereinafter SUPREME COURT PRACTICE].

[34]The petitioner has ninety days from the highest state court's decision to file a petition for writ of *certiorari*. SUP. CT. R. 13(1).

[35]*See infra* note 104 and accompanying text.

[36]*Duncan*, 533 U.S. 167.

that was later dismissed without prejudice.[37] Instead, the Court concluded that tolling only occurs when relief is sought *in a state court*.[38] Several circuits have extended *Duncan*'s analysis to conclude that the limitations period is not tolled by §2244(d)(2) when a prisoner seeks review in the Supreme Court from a state court decision in a post-conviction proceeding, because the United States Supreme Court is not a "state" court.[39]

Artuz v. Bennett held that an application for post-conviction relief or other collateral review is "properly filed" for purposes of tolling when it is delivered to and accepted by the appropriate court in compliance with the jurisdiction's laws and rules governing filing.[40] Whether the application is properly filed is determined without regard to whether the claims raised in that application meet state procedural bar rules.[41] Despite that ruling, the circuits had been split on whether such an application is "properly filed" if brought outside the State's statute of limitations but the petitioner claims it falls within an exception recognized by state law.[42]

The Court recently resolved the question in *Pace v. DiGuglielmo*.[43] In *Pace* the Court held that "time limits, no matter their form are 'filing' conditions."[44] Thus, a petition rejected by the state court as untimely will not be deemed "properly filed" for purposes of invoking statutory tolling per § 2244(d)(2).[45]

In *Carey v. Saffold*, the Court determined that an application for state post-conviction relief was "pending" during the time *between* a lower state court's decision and when the petitioner seeks review of that decision in a higher state court.[46] According to the Court, the same rule governs whether state law requires the petitioner to seek an appeal of the lower state court decision or whether review must be sought in the form of an original petition to the higher state court.[47]

This article will attempt to demonstrate that based on the history and purpose of the writ of *certiorari*, and these recent Supreme Court decisions, an application for state post-conviction relief must be considered pending while review of the state court's decision on that application is sought in the United States Supreme Court, thus tolling the limitations period pursuant to §2244(d)(2). However, until the

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[37] *Id.* at 172, 181-82.

[38] *Id*. at 180.

[39] *See infra* note 72 and accompanying text.

[40] *Artuz*, 531 U.S. at 6-10.

[41] *Id.* at 8-11.

[42] *Compare* Merritt v. Blaine, 326 F.3d 157, 167-68 (3d Cir. 2003), *cert. denied*, 540 U.S. 921 (2003), *and* Brooks v. Walls, 301 F.3d 839, 841 (7th Cir. 2002), *cert. denied*, 538 U.S. 1001(2003), *with* Dictado v. Ducharme, 244 F.3d 724, 727-28 (9th Cir. 2001), *and* Smith v. Ward, 209 F.3d 383, 385 (5th Cir. 2000).

[43] Pace v. DiGuglielmo, 125 S. Ct. 26 (2004), *aff'd*, 125 S. Ct. 1807 (2005).

[44] *Id.* at 1814.

[45] *Id.*

[46] *Saffold*, 536 U.S. at 220-22.

[47] *Id.* at 223-25.

Supreme Court chooses to resolve the issue, the current state of confusion counsels any cautious petitioner to assume that tolling will not occur, and perhaps to forego the potential benefits of seeking *certiorari* review before seeking federal habeas corpus relief.

I. THE NATURE OF A PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES SUPREME COURT

The history and purpose of the writ of *certiorari* to the United States Supreme Court are consistent with considering the application for *certiorari* to the Supreme Court as an extension of the *state* post-conviction proceedings that the Court is asked to review. Article III of the United States Constitution vested the judicial power of the United States in the Supreme Court, and extended the Court's power "to all Cases, in Law and Equity, arising under this Constitution . . . ."[48] In accordance with that power, section 25 of the Judiciary Act of 1789 established the authority of the Supreme Court to review decisions of any state's highest court where there is a challenge based on the United States Constitution or federal law.[49] Although this authority has some limits, the Court's power and authority to review criminal cases arising from state courts has been firmly established for nearly two hundred years.[50] Indeed, this authority significantly predates the extension of federal habeas corpus to state prisoners—which did not occur until 1867.[51] Thus, the United States Supreme Court has long been the first line of defense against state court decisions that are in violation of federal law or the United States Constitution.

The Supreme Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."[52] Nothing in this provision limits the Court's jurisdiction to consider the "judgment" or "decree" rendered by the highest court of a [s]tate,"[53] denying a claim for post-conviction relief when that claim arises from a violation of the state inmate's "right . . . claimed under the Constitution . . . of . . . the United States."[54] Indeed, 28 U.S.C. § 1257(a) has been described as "cover[ing] the entire range of federal questions that can arise in a case in state court. All such questions are within the *certiorari* jurisdiction of the Supreme Court."[55]

A petition seeking *certiorari* review from the United States Supreme Court should be treated as, in effect, an extension of the proceeding from which review is sought. The availability of review in a separate federal habeas proceeding does not

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[48]U.S. CONST. art. III, §§ 1, 2.

[49]Judiciary Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385-86.

[50]Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

[51]*See* Fay v. Noia, 372 U.S. 391, 415 (1963), (citing Judiciary Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385-86), *overruled in part on other grounds by* Coleman v. Thompson, 501 U.S. 722, 744-51 (1991).

[52]28 U.S.C. § 1257(a) (2000).

[53]SUPREME COURT PRACTICE, *supra* note 33, at 141.

[54]28 U.S.C. § 1257(a).

[55]SUPREME COURT PRACTICE, *supra* note 33, at 141 (emphasis added).

make the state court judgment in a post-conviction proceeding any less "final" for purposes of the Supreme Court's jurisdiction. Seeking *certiorari* in the United States Supreme Court from an adverse state court decision in a post-conviction proceeding is not *required* before the claim can be considered exhausted for purposes of seeking federal habeas review.[56] On the other hand, nothing *prohibits* a state prisoner from exercising the right to seek *certiorari* review in the United States Supreme Court before bringing his or her claim to the federal district court.

No authority suggests that when Congress enacted the AEDPA in 1996, it intended to limit the power or jurisdiction of the Supreme Court to consider state post-conviction decisions. Considering the AEDPA as a whole suggests that, as Congress did not explicitly address the Supreme Court's jurisdiction over state post-conviction decisions, it had no intention to limit or eliminate it. Indeed, in another provision of the AEDPA, Congress expressly relieved the Supreme Court of appellate jurisdiction, by way of *certiorari* petition or appeal, over federal appellate court decisions denying leave to file a second federal habeas corpus petition.[57] Section 2244(b)(3)(E) provides: "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable *and shall not be the subject of a petition for rehearing or for a writ of certiorari*."[58] Thus, when Congress intended to use the AEDPA to limit the Supreme Court's jurisdiction, it did so with specificity. Congress imposed no such limitation on the Supreme Court's jurisdiction to consider state post-conviction decisions.

Although petitions for *certiorari* are rarely granted,[59] review by the United States Supreme Court poses at least one significant advantage for a state prisoner challenging the constitutionality of his or her conviction. Once *certiorari* has been granted, the prisoner need only demonstrate that the state court determined the federal constitutional issue incorrectly as a matter of law; the prisoner may take advantage of newly decided cases or even argue for new rules.[60] To raise a successful challenge in a federal habeas petition, under the new standards created by the AEDPA, the state petitioner must meet the much more restrictive burden of demonstrating that the adjudication of his or her claim in state court either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was

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[56]*Fay*, 372 U.S. at 435. The Court found that a petition to the United States Supreme Court was not necessary for exhausting a claim in state court because the United States Supreme Court "is not the court of any State. . . ." *Id.* at 436.

[57]*See* 28 U.S.C. § 2253; *cf.* Felker v. Turpin, 518 U.S. 651(1996) (upholding this provision because the Court's jurisdiction to consider original petitions per 28 U.S.C. § 2241 and § 2254 remained intact).

[58]28 U.S.C. § 2244(b)(3)(E) (emphasis added).

[59]In recent years, the Court has received approximately 7000 petitions for *certiorari* per year, and has granted less than 100 of those petitions per year. SUPREME COURT PRACTICE, *supra* note 33, at 59-60.

[60]For a discussions of particular circumstances in which it may be more advantageous for a petitioner to seek *certiorari* review before filing a federal habeas petition, see LIEBMAN & HERTZ, *supra* note 22, § 6.4(b), 263-66; *see also id.* §5.1, 214-16.

> based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[61]

The prisoner's right to relief from a constitutional violation when he or she seeks *certiorari* review in the United States Supreme Court from the judgment of a state court rendered in a post-conviction or other collateral proceeding is not subject to such stringent limits.[62] Permitting the petitioner to try to take advantage of the diminished burden does not serve or disserve the exhaustion, comity, and federalism concerns. Whether the petitioner seeks review from the United States Supreme Court or goes instead to a federal district court, the petitioner nonetheless is required to have the issue first determined in the state courts.

In 1963, in *Fay v. Noia*, the Court eliminated *certiorari* petitions as a requirement of exhaustion.[63] Among the Court's concerns was the volume of *certiorari* petitions filed that did not meet the Court's standards for granting *certiorari* and the associated waste of judicial resources because the Court was required to review such petitions.[64] Permitting a properly filed petition for writ of *certiorari* to toll the limitations period for seeking federal habeas review may result in some increase in the number of such petitions from state prisoners,[65] but the alternative effectively precludes state prisoners from exercising their rights to seek review in the United States Supreme Court.

Refusing to toll the habeas limitations period while a state inmate seeks *certiorari* review from a decision made on state post-conviction review is certain to discourage the filing of both frivolous and meritorious *certiorari* petitions. Discouraging meritorious petitions may stifle the development of the law regarding those constitutional protections the violation of which cannot be raised on direct review.[66] Federal habeas relief is only available when the state court decision is

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[61]28 U.S.C. § 2254(d). A state court renders an opinion "contrary to" clearly established Supreme Court precedent only when it "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or decides a case differently than the Court has on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court renders an opinion which "unreasonabl[y] appli[es]" Supreme Court precedent when it "identifie[d] the correct . . . legal principle from th[e] Court's [decisions] but unreasonably applie[d] [that principle] to the facts of the . . . prisoner's case." *Id.* at 407. To warrant federal habeas relief, a state court decision must not only be incorrect, it must be "objectively unreasonable." Yarborough v. Gentry, 540 U.S. 1, 5 (2003).

[62]*See infra* notes 76-77 and accompanying text

[63] *Fay v. Noia*, 372 U.S. at 438-39.

[64]*Id.* at 437.

[65]It must be acknowledged that the number of *in forma pauperis* petitions filed with the Court has increased dramatically in recent years. Indeed, they have more than doubled from approximately 2500 in 1985 to over 6500 in 2000. SUPREME COURT PRACTICE, *supra* note 33, at 57-58. While all *in forma pauperis* petitions may not arise from criminal cases, some have suggested that "[t]his dramatic increase may be due, at least in part, to the nationwide increase in prison population, as well as legislative creation of new crimes and longer punishments." *Id.* at 58.

[66]Many issues, such as *Brady* violations or most ineffective assistance of counsel claims, can only be raised in post-conviction proceedings because the factual support for the claim is not evident on the face of the appellate record.

contrary to, or unreasonably applies "clearly established law, as determined by the United States Supreme Court."[67] Thus, decisions in federal habeas cases do nothing to develop or clarify the law regarding substantive constitutional protections. With fewer *certiorari* petitions from state post-conviction issues, the Court will have fewer opportunities clearly to define the law, in turn, making it harder still to obtain federal habeas relief.

II. THE STATUTORY CONSTRUCTIONS

The construction of the AEDPA's statute of limitations is a question of federal law.[68] While the three Supreme Court decisions interpreting 2244(d)(2) applied a variety of statutory construction rules, they share two basic principles: (1) any interpretation must begin with the statutory language, and (2) any interpretation should be consistent with the "AEDPA's purpose to further the principles of comity, finality, and federalism."[69] Tolling while a *certiorari* petition from a state post-conviction is filed is a reasonable construction of § 2244(d)(2) under both those principles.

In *Duncan*, the Court found that federal habeas petitions did not fall within the tolling provision.[70] First, the petitioner timely filed a federal habeas petition that was dismissed without prejudice three months later; eleven months after that, he filed a second petition that was dismissed as untimely; the second petition would have been timely *if* the statute of limitations was considered tolled during the pendency of the first petition.[71] The Court concluded that the filing of the first dismissed habeas petition did not trigger the tolling provision of § 2244(d)(2) because a *federal* habeas petition was not an "application for State post-conviction or other collateral review."[72] The Court held that "State" modified both "post-conviction" and "other collateral review."[73]

The Court reached this conclusion by relying on several tenets of statutory construction. First, the Court noted that both the terms "State" and "federal" had been used in § 2254(1) and § 2261(e) when Congress wanted both types of proceedings to be considered. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[74] Thus, the failure to mention "federal" in § 2244(d)(2) precluded tolling during the pendency of federal post-conviction review. Second, the Court noted its duty to give effect, if possible, to every clause and word of a statute.[75] The Court

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[67] *See Williams*, 529 U.S. at 405-07.

[68] *See, e.g.*, Crawley v. Catoe, 257 F.3d 395, 397-98 (4th Cir.2001).

[69] Duncan v. Walker, 533 U.S. 167, 178 (2001) (quoting *Williams*, 529 U.S. at 436); *see also* Artuz v. Bennett, 531 U.S. 4, 9-10 (2000).

[70] 533 U.S. at 181-82.

[71] *Id.* at 170-71.

[72] *Id.* at 181 (quoting 28 U.S.C. § 2244 (d) (2)).

[73] *Id.*

[74] 533 U.S. at 173 (quoting Bates v. United States, 522 U.S. 23, 29-30 (1997)).

[75] *Id.* at 174 (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955))

found that to include federal habeas petitions as applications for "State post-conviction or other collateral review" would render the term "State" superfluous.[76] Finally, the Court noted that tolling during the federal habeas proceedings would do nothing to fulfill exhaustion requirements or promote interests in comity, finality, and federalism.[77]

Numerous circuit courts have mechanically applied *Duncan*'s construction and found that a *certiorari* petition to the United States Supreme Court is not an application to a *state* court, so it does not toll the limitations period per 2244(d)(2).[78] The statutory construction adopted in *Duncan*, however, does not compel that conclusion. Significant differences between *certiorari* review and review on federal habeas support treating them differently for tolling purposes. A *certiorari* petition extends from the proceeding that produced the judgment the Court is asked to review; a federal habeas petition does not. When reviewing a judgment from a state's highest court, the Supreme Court's review "shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States."[79] In effect, when the United States Supreme Court exercises *certiorari* review of a state court's judgment it sits as a superior state appellate court.

While, the United States Supreme Court's "appellate function" when reviewing state court decisions "is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention simpliciter."[80] On *certiorari* review, the Supreme Court determines the validity of a particular judgment on a constitutional question. In contrast, "[h]abeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner."[81] This distinction is important to the tolling provision of § 2244(d)(2). It suggests that, even after *Duncan*, the primary concern should not be in which court review is sought, but the nature of the original proceeding giving rise to the judgment sought to be reviewed.

Courts that have applied *Duncan* to bar application of the tolling provision while a prisoner seeks United States Supreme Court review of a decision on a state post-conviction petition could be said to focus on the wrong part of § 2244(d)(2). While *Duncan* was concerned with whether the "application" initially filed sought "state post-conviction or other state collateral review,"[82] the concern in these other cases

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[76]*Id.* at 174-75.

[77]*See id.* at 178-80.

[78]*See, e.g.*, Miller v. Dragovich, 311 F.3d 574, 579 (3d Cir. 2002); *Crawley*, 257 F.3d at 399-400; Rhine v. Boone, 182 F.3d 1153, 1156 (10th Cir. 1999); *cf.* Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir. 2001).

[79]28 U.S.C. § 2104 (2000).

[80]Fay v. Noia, 372 U.S. 391, 430 (1963).

[81]*Id.* at 430-31 (citing *In re* Medley, 134 U.S. 160, 173 (1890)).

[82]533 U.S. at 169.

should be with whether an application, admittedly seeking state post conviction or other collateral review, is still "pending" after the state court has rendered its final decision and while the prisoner is seeking the United States Supreme Court's review of that state court decision. Unlike a federal habeas petition, which reviews the legality of a particular *confinement*, review on *certiorari* is akin to an appeal from a specific state court *judgment*. While that state court judgment is still under review, in whatever court, the proceeding that gave rise to the judgment could be considered still "pending." This approach is consistent with the statutory construction employed in *Saffold*. There, the Court concluded that "an application is pending as long as the ordinary state collateral review process is 'in continuance'—i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains 'pending.'"[83]

The Supreme Court's power and function when reviewing a state court decision, as well as the overwhelming weight of case law interpreting the term "pending" as used in § 2244(d)(2), support the conclusion that the pendency of the application should extend through any proceeding in which the prisoner seeks review of the decision on the application, from a court with the power and jurisdiction to conduct such review. For example, even before *Saffold*, most circuits held that a state post-conviction petition is deemed pending during the entire time the petitioner exercises the various available levels of state court review, including gaps between a lower court's entry of judgment and the ensuing filing of a notice of appeal.[84] This position was confirmed in *Saffold*, which specifically answered in the affirmative the question: "Does that word ["pending"] cover the time between a lower state court's decision and the filing of a notice of appeal to a higher state court?"[85] *Saffold*'s construction was based on the "ordinary meaning" of the word "pending," and how that interpretation achieved the goal of "promot[ing] the exhaustion of state remedies while respecting the interest in the finality of state court judgments."[86] Thus, in *Saffold* the Court concluded that "an application is pending as long as the ordinary state collateral review process is 'in continuance'—i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution through

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[83]Carey v. Saffold, 536 U.S. 214, 219-220 (2002) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (1993)).

[84]Barnett v. LeMaster, 167 F.3d 1321, 1323 (10th Cir. 1999); *see also* Currie v. Matesanz, 281 F.3d 261 (1st Cir. 2002); Welch v. Newland, 267 F.3d 1013 (9th Cir. 2001); Peterson v. Gammon, 200 F.3d. 1202 (8th Cir. 2000).

[85]536 U.S. at 217. The dissent in *Saffold* suggested, however, that this part of the majority's opinion was mere dicta because the case under review did not involve a state court appeal from a lower court decision; instead, *Saffold* involved the interim between the determination of an original state habeas petition and the filing of a subsequent original petition in a higher state court. *Id.* at 227 (Kennedy, J., dissenting) ("The Court . . . begins by considering a question not presented, whether the statute of limitations would have been tolled for a hypothetical prisoner who filed an appeal somewhere else. . . . After holding that tolling applies for its hypothetical appellant, the Court finally gets to California, where no appeal was filed.").

[86]*Id.* at 220 (quoting *Duncan*, 533 U.S. at 178).

the State's post-conviction procedures, by definition it remains 'pending.'"[87] Although *Saffold* talks in terms of completing a *state* review process, such proceedings cannot be considered "complete" while available avenues of review, such as *certiorari* review in the United States Supreme Court, still are being pursued.

As a result of review in the United States Supreme Court, a state court action can be remanded to the state courts for further proceedings. The Supreme Court's power to issue a determination is akin to that of a superior state appellate court over a lower state court:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[88]

If a petition for *certiorari* seeking review of a state court judgment in a post-conviction proceeding does not toll the limitations period, this would lead to an anomalous situation. While the Court is considering the petition, the underlying proceeding is not pending, but if the Court grants review and later exercises its authority to remand for further state court proceedings, upon return to the state court the application magically would again become "pending" for purposes of § 2244(d)(2). Indeed, one federal district court, confronted with a similar situation, held that where a petition for *certiorari* to the United States Supreme Court was granted, the state court judgment vacated, and the case remanded for further proceedings in the state court, the limitations period must be considered retroactively tolled by § 2244(d)(2) for the entire period the case was before the United States Supreme Court.[89]

Given the nature of the review available from the Supreme Court, the pendency of a *certiorari* petition should fall within the provision permitting tolling while an application for state post-conviction review is pending. Review, even by the United States Supreme Court, of the state court's decision is still review of the application for post-conviction relief. And, while the state court application is under review, it should be considered "pending" for purposes of § 2244(d)(2).

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[87]*Id.* at 219-220 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1669 (1993)).

[88]28 U.S.C. § 2106.

[89]*See* Coleman v. Davis, 175 F. Supp. 2d 1109, 1111 (N.D. Ind. 2001). The court relied on "retroactive" tolling because of the overwhelming weight of case law that does not permit tolling while a *certiorari* petition is pending. *Id.* The Third Circuit acknowledged the anomaly "that the Supreme Court might grant a petition for *certiorari* to review a decision of a state supreme court in a post-conviction relief or other collateral review proceeding and that a petitioner nevertheless in order to avoid the bar of section 2244(d)(1) might file a federal habeas corpus petition that could be pending at the same time that the Supreme Court is considering the petitioner's appeal on the merits." *Miller*, 311 F.3d at 580 (emphasis added). Nonetheless, the court persisted in its holding that the mere filing of a petition for *certiorari* does not invoke the tolling provision. *Id.* at 581. Instead, it proposed as a solution for future cases that, if the petition is granted, a federal district court could stay proceedings on any timely filed federal habeas petition. *Id.*

Despite the broad readings of the term "pending," both before and after *Saffold*, most circuits have held that an application is not pending for tolling purposes during the time the petition could have, but ultimately did not, file a petition for writ of *certiorari* to the United States Supreme Court. For example, in *Maloney v. Poppel*, the Tenth Circuit held that in order for the tolling provision of § 2244(d)(2) to apply during the interim when additional review *may be sought*, the petitioner must *actually seek* that additional review.[90] Thus, in most circuits, when a petitioner opts not to seek *certiorari* review in the United States Supreme Court from a state post-conviction decision, the limitations period would not extend for the ninety days following the state court decision during which *certiorari* may be sought; if additional review ultimately is not sought, there is no "pending" application to which the tolling provision could apply.[91]

Many of these cases did not address the application of § 2244(d)(2) when a *certiorari* petition to the United States Supreme Court actually is filed seeking review of the highest state court decision on that post-conviction application.[92] In *Gutierrez v. Schomig*, for example, the Seventh Circuit concluded that §2244(d)(2) does not toll the limitations period for the ninety days following the decision in a state court post-conviction proceeding during which the state inmate *could file* a *certiorari* petition, if the inmate does not *actually file* a petition for *certiorari* by the end of that period.[93] As the court explained, "[b]ecause Gutierrez never filed a petition for *certiorari* review in the Supreme Court, his potential *certiorari* petition was never 'properly filed' . . . [and] a petition for *certiorari* that is not actually filed cannot reasonably be considered 'pending.'"[94] All the circuits, with the exception of the Sixth, similarly have concluded that tolling does not occur for the period when *certiorari* could be sought.[95] Several circuits, like the Seventh, have reached similar conclusions without "address[ing] the impact of a properly filed petition for *certiorari* from the denial of state post-conviction relief on the statute of limitations in *habeas* corpus actions."[96]

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[90]173 F.3d 864 (10th Cir. 1999). The Tenth Circuit later concluded, however, that even if a *certiorari* petition is filed, tolling does not occur. *See Rhine*, 182 F.3d at 1155.

[91]*See* David v. Hall, 318 F.3d 343, 345 (1st Cir. 2003); Smaldone v. Senkowski, 273 F.3d 133, 138 (2d Cir. 2001); Stokes v. Dist. Att'y of County of Phila. 247 F.3d 539, 540 (3d Cir. 2001); Atkinson v. Angelone, 20 F. App'x. 125, 127-28, (4th Cir. 2001); Ott v. Johnson, 192 F.3d 510, 513 (5th Cir. 1999); Gutierrez v. Schomig, 233 F.3d 490, 490-91 (7th Cir. 2000); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir. 2001); White v. Klitzkie, 281 F.3d 920, 924-25 (9th Cir. 2002); *Maloney*, 173 F.3d 864 (unpublished table decision); Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir. 2000).

[92]*David*, 318 F.3d at 345; *Smaldone*, 273 F.3d at 138; *Snow*, 238 F.3d at 1035; *Gutierrez*, 233 F.3d at 492; *Ott*, 192 F.3d at 513.

[93]233 F.3d at 492.

[94]*Id.* (emphasis added).

[95]*See Maloney*, 173 F.3d 864 (unpublished table decision); *see also White*, 281 F.3d at 924-25; *Stokes*, 247 F.3d at 540; *Atkinson*, 20 F. App'x . at 127-28; *Coates*, 211 F.3d at 1227.

[96]*Gutierrez*, 233 F.3d at 492 (emphasis added); *see also David*, 318 F.3d at 345; *Smaldone*, 273 F.3d at 138.

In *David v. Hall*, where the court found no tolling because the petitioner had not filed a *certiorari* petition, the First Circuit noted the state's argument that the reasoning of *Duncan* would make the tolling provision inapplicable even if a *certiorari* petition had been filed.[97] While concluding that the issue need not be decided in that case, the court commented that *Duncan* "is arguably distinguishable and there are language and policy arguments on the other side . . . ."[98] Recently, the Sixth Circuit in *Abela v. Martin*, chose to adopt those arguments on the other side.[99]

When a *certiorari* petition actually has been filed, the arguments for tolling are even stronger. First, as set forth above,[100] filing the *certiorari* petition extends the pendency of the proceeding sought to be reviewed. Second, comparison with other AEDPA provisions, and the legislative intent that can be gleaned from their differences, supports tolling.

Section 2244(d)(1), which defines the dates from which the one-year limitations period may begin to run, refers to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[101] This has been interpreted to mean that, even if the state inmate does not seek direct review in the United States Supreme Court, the conviction does not become final until the time to file a *certiorari* petition expires[102]–i.e., ninety days after the state highest court's decision on direct review.[103] Because the same finality concerns are not implicated by § 2244(d)(2), courts have found that the language of § 2244(d)(1), particularly the reference to "the expiration of the time for seeking such review," cannot be extended to United States Supreme Court *certiorari* petitions from state post-conviction proceedings.[104] If anything, the difference between § 2244(d)(1)(A) and § 2244(d)(2) reflects the concern that it is not the opportunity to seek review that justifies tolling, but the petitioner's actual exercise of the right to seek review that warrants tolling the limitations clock.

When Congress drafted 28 U.S.C. § 2263(b)(2), the AEDPA's counterpart to § 2244(d)(2) for certain capital cases,[105] it specified that the tolling period concluded with the review in the state court. This section tolls the limitations period "from the date on which the first petition for post-conviction review or other collateral relief is

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[97] *David*, 318 F.3d at 345 n.2.

[98] *Id*.

[99] Abela v. Martin, 348 F.3d 164 (6th Cir. 2003) (en banc). *See infra* notes 110-112 and accompanying text.

[100] *See supra* notes 77-83 and accompanying text.

[101] 28 U.S.C. § 2244(d)(1)(A).

[102] *See Rhine*, 182 F.3d at 1155; *cf.* Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) (finding that a state conviction is "final" for purposes of retroactivity doctrine when available avenues of direct appeal are exhausted, including denial of a petition for writ of *certiorari* from the United States Supreme Court or the expiration of the time to seek *certiorari review*).

[103] SUP. CT. R. 13(1).

[104] *Id.*

[105] 28 U.S.C. § 2263 only applies to capital cases in those states which "opt-in" to the special scheme for capital cases. *See* 28 U.S.C. § 2261.

filed *until the final State court disposition of such petition . . . .*"[106] If Congress intended to limit § 2244(d)(2) to review occurring in the state court, § 2263 indicates that it knew how to do so with precision. The Supreme Court has recognized, as a principle of statutory construction, that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[107] Indeed, the very same rule of statutory construction was applied in *Duncan*.[108] The failure to include a similar limitation in § 2244(d)(2) suggests that so long as a non-capital petitioner actually is seeking review of the particular judgment rendered on his or her state post-conviction application—whether from another state court or in a petition for *certiorari* to the United States Supreme Court—the tolling provisions of § 2244(d)(2) apply.

One might assume that Congress would have intended to provide inmates facing capital sentences with more, not less process than capital petitioners, making this distinction between capital and non-capital inmates unreasonable. The provisions of § 2263 only kick in, however, in those opt-in states that provide counsel for capital petitioners even in state post-conviction proceedings. Moreover, the very name of the Act, the "Antiterrorism and Effective Death Penalty Act," indicates that part of its purpose was to streamline what had been become a lengthy, drawn out process of review in capital cases.[109]

The exclusion of *certiorari* petitions to the United States Supreme Court from § 2244(d)(2)'s tolling provision also may encourage unfairness, confusion, or needless litigation in the federal courts. For example, a state prisoner may have constitutional claims that he or she raised on direct appeal and others that were raised in a state post-conviction petition. If the prisoner prevails in the state post-conviction proceedings, the *State*'s only remedy is to seek *certiorari* in the United States Supreme Court. Where a prisoner prevails, and the State intends to seek *certiorari*, the state court may stay execution of the judgment while the State seeks *certiorari*; in that case, the state post-conviction proceedings would still be "pending." Prisoners who do not prevail, however, do not get the same treatment; in their cases, the underlying judgment of conviction remains undisturbed. If the state court did not grant a stay while the State sought *certiorari* from an adverse decision in the state post-conviction proceeding, then the judgment is considered vacated even while the State is seeking *certiorari* review.

In the unlikely event that the United States Supreme Court granted the state's *certiorari* petition in such a case, and later reversed the state court's decision, such proceedings would likely last at least one year. What that would do to the prisoner's federal habeas limitations period (for raising those other constitutional violations addressed by the state courts on the direct appeal) is unclear. During the period of the Supreme Court's review, the conviction would have been vacated, so the prisoner (or former prisoner) would have no basis for seeking federal habeas review. How

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[106] 28 U.S.C. § 2263(b)(2) (emphasis added).

[107] Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

[108] *See supra* note 68 and accompanying text.

[109] *See* Woodford v. Garceau, 538 U.S. 202, 206 (2003) (citing *Williams*, 529 U.S. at 386).

the federal habeas limitations period should apply after the Supreme Court has reinstated the conviction, is impossible to determine from the language of the AEDPA.

Similar difficulties would arise if the state court's post-conviction decision is unfavorable to the prisoner, the prisoner's *certiorari* petition is granted, and the Supreme Court ultimately affirms the state post-conviction decision of the state court. The time it took the Supreme Court to decide the case likely would consume the remainder of the prisoner's limitations period. Thus, to preserve the right to seek federal habeas review, particularly of those claims not addressed in the *certiorari* petition, the prisoner would have to file a federal habeas petition while the Supreme Court is reviewing the state post-conviction decision[110]—even though a decision in the Supreme Court favorable to the defendant would render the federal habeas petition moot. This certainly does not serve traditional interests in judicial economy and efficiency. And again, for the *pro se* litigant, managing two legal proceedings at the same time may be an absolutely unmanageable burden.

III. THE SIXTH CIRCUIT STEPS OUT

One of the first well-articulated arguments in favor of applying the tolling provision while *certiorari* review is sought from a state post conviction decision came in a dissenting opinion by Judge Berzon of the Ninth Circuit in *White v. Klitzkie*.[111] Drawing substantially from that dissenting opinion, the Sixth Circuit, *en banc*, recently parted company with the other circuits and held that the federal habeas corpus limitations period is tolled during the period *certiorari* review by the United States Supreme Court either was or could have been sought.[112]

In *Abela v. Martin*, the Sixth Circuit characterized the critical question as "whether a petition for writ of *certiorari* to the Supreme Court may constitute a 'properly filed' and 'pending' application for 'State post-conviction [review]' or 'other State collateral review' so as to toll the section 2244(d)(1) limitations period."[113] As an initial matter, the court noted that reliance on *Duncan* did not

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[110]The AEDPA also strongly disfavors second or successive federal habeas petitions. *See* 28 U.S.C. § 2244(b). Thus, the petitioner would have to include in a single petition those claims addressed by the state court on direct appeal and those addressed in the state post-conviction proceedings as to which the petitioner is also seeking *certiorari* review.

[111]281 F.3d 920, 926-29 (9th Cir. 2002) (Berzon, J., dissenting). Previously, the Third Circuit, in *Morris v. Horn*, 187 F.3d 333, 336-37 (3d Cir. 1999), had stated that the limitations period was tolled while the petitioner sought *certiorari* review from his first state post-conviction decision. *See* supra note 27. The Third Circuit distinguished those cases in which *certiorari* was not sought, and determined that tolling did not apply for the ninety day period for seeking *certiorari* in the United States Supreme Court. *See* Nara v. Frank, 264 F.3d 310, 318 (3d Cir. 2001); Stokes v. Dist. Att'y of County of Phila., 247 F.3d 539 (3d Cir. 2001). Later, the Third Circuit abandoned that distinction and joined the other circuits finding that tolling did not occur in either circumstance. *See* Miller v. Dragovich, 311 F.3d 574, 579 (3d Cir. 2002).

[112]Abela v. Martin, 348 F.3d 164 (6th Cir. 2003) (en banc).

[113]*Id.* at 167 (emphasis added).

answer the question; instead the court focused on the term "pending."[114] Specifically, the court stated as follows:

> We believe that a petition for *certiorari* from a state court's denial of an application for habeas corpus necessitates that the application is still pending, because it is 'in continuance' or 'not yet decided.' The focus of section 2244(d)(2) is not on the court in which the application is pending, but on the application itself.[115]

After all, when the United States Supreme Court considers a state post-conviction petition on *certiorari*, it is not considering "an application for *federal* post-conviction or other collateral review."[116] The *Abela* court also expressed concern that requiring "a petitioner to file his petition seeking federal habeas corpus relief before he has sought *certiorari* to the Supreme Court does not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief."[117]

Abela went even further. The court concluded that even when no petition for *certiorari* is filed, the period when a *certiorari* petition could be filed tolls the limitations period.[118] The court opted for a practical, predictable rule that does not make tolling contingent upon some act that may happen in the future.[119] Following the reasoning of *Saffold*, the court held that "'pending' should not be construed to refer only to the time a court takes to evaluate a case at some stage of the post-conviction review process; 'pending' also refers to the time allowed an inmate to file a *certiorari* petition regardless of whether such filing occurs."[120]

While the Sixth Circuit opinion is well-reasoned and consistent with the statutory language, at this stage it does little more than add to the lack of consensus about what § 2244(d)(2) means. Without guidance from the Supreme Court, this confusion is unlikely to be resolved. Indeed, although the Supreme Court's denial of *certiorari* in any case addressing this issue may not have precedential value, it has the practical effect of construing the tolling provision as inapplicable while *certiorari* is sought from a state post-conviction decision. The cautious prisoner wanting to preserve his or her right to seek federal habeas corpus relief still either will forego seeking *certiorari* review or will simultaneously file petitions for *certiorari* and for federal habeas corpus.[121]

A reasonable statutory construction of § 2244(d)(2) would provide for the limitations period for seeking federal habeas relief to be tolled during the time when the petitioner, or the State, is seeking review of a judgment in a state post-conviction

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[114] *Id.*

[115] *Id.* at 170 (emphasis added).

[116] *Id.* at 170-71 (emphasis added) (quoting *White*, 281 F.3d at 927 (Berzon, J., dissenting))

[117] *Id.* at 171 (emphasis added).

[118] *Id.* at 172-73.

[119] *Id.* at 171-73.

[120] *Id.* at 172 (emphasis added).

[121] *See* LIEBMAN & HERTZ, *supra* note 22, § 6.4(b), 265-66.

proceeding, when that review is properly and timely sought in a *certiorari* petition to the United States Supreme Court. To hold otherwise is to eviscerate the long-accepted right to seek review of constitutional issues, arising in criminal cases, from the United States Supreme Court. Nonetheless, until the United States Supreme Court speaks on this issue, confusion, and a trap for the unwary will persist.