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No. _____ OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

EVAN GRIFFITH,

Petitioner,

v.

DAVE REDNOUR, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Evan Griffith (“Griffith”) seeks review of an opinion of the Seventh Circuit affirming the dismissal of his federal habeas corpus petition on the ground that the petition was filed 14 days late and therefore outside of the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act (“AEDPA”). Three judges of the Seventh Circuit dissented from the denial of rehearing *en banc*.

The questions presented in this petition are:

1. Did the Seventh Circuit erroneously apply this Court’s decisions in *Carey v. Saffold*, 536 U.S. 214 (2002) and *Evans v. Chavis*, 546 U.S. 189 (2006), and create a conflict with the approach taken by other circuits when it ruled for purposes of the statute of limitations in AEDPA that the Illinois Supreme Court could not make a state Petition for Leave to Appeal “timely” by granting a retroactive 14-day extension of time pursuant to established state court rules and decisions?
2. Whether the Seventh Circuit erred in ruling that the one-year statute of limitations in AEDPA governing a federal habeas corpus petition should be enforced – and review on the merits denied – against a petitioner who presents a credible claim of actual innocence?

PARTIES TO THE PROCEEDING

The parties appearing here and below are (1) Evan Griffith, the petitioner named in the caption, and (2) Dave Rednour, Warden at the Menard (Illinois) Correctional Center.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Evan Griffith (“Griffith”) respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The 3-1-3 opinion of the Illinois Supreme Court affirming Evan Griffith’s conviction and death sentence on direct appeal is reported at 634 N.E.2d 1069 (Ill. 1994), and included in the Appendix at 99a to 140a.¹ The July 13, 2005 order of the Illinois Appellate Court affirming the trial court’s order denying Griffith’s state post-conviction petition is unreported. (App. 46a-98a.) The December 1, 2005 decision of the Supreme Court of Illinois denying Griffith’s Petition for Leave to Appeal is unreported. (App. 25a.) The March 30, 2009 decision of the United States District Court for the Central District of Illinois denying Griffith’s 28 U.S.C. § 2254 habeas petition as untimely is unreported. (App. 27a-44a.) The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court is reported at 614 F.3d 328 (7th Cir. 2010) and is reproduced in the Appendix at 13a to 19a. The order of the Seventh Circuit denying the petition for

¹ On January 10, 2003, the Governor of Illinois commuted Griffith’s death sentence to life in prison without possibility of parole.

rehearing and rehearing *en banc*, together with the dissenting opinion of three judges, is reported at 623 F.3d 1166 (7th Cir. 2010) and is reproduced in the Appendix at 1a to 12a.

JURISDICTION

The Court of Appeals for the Seventh Circuit entered judgment on July 22, 2010. On October 28, 2010, the Seventh Circuit denied Griffith's timely filed petition for rehearing or rehearing *en banc*, with three judges dissenting. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1), which authorizes this Court to review a judgment of the Seventh Circuit denying a petition for writ of habeas corpus under 28 U.S.C. § 2254.

STATUTES INVOLVED

This case involves 28 U.S.C. § 2244 and 28 U.S.C. § 2254, which are reproduced at pages 153a to 160a of the Appendix.

STATEMENT OF THE CASE

A. The State Court Proceedings.

While incarcerated at the Pontiac Correctional Facility in 1990, Petitioner Evan Griffith became involved in a fight and stabbed fellow inmate Joseph

Moore.² The only issue at his 1992 trial was whether Griffith acted in self-defense. Five inmates, plus Griffith, testified to a similar version of the incident, with one significant difference: Griffith, inmate John Gibson, and inmate Kevin Walton each testified that Moore was the initial aggressor and that Griffith defended himself after Moore swung a shank at him. (R. 1341-43, 1357, 1377-80, 1410-11, 1413-15.)³ Three other inmates – Michael Marzette, Bernie Cleveland, and Larry Nelson – each testified that Griffith and another inmate, William Mackey, were the initial aggressors. (R. 1252-54, 1269-71, 1284-86, 1309-10, 1315.)

Griffith was convicted of first-degree murder and unlawful possession of a weapon. After waiving a sentencing jury, the trial court sentenced Griffith to

² Griffith (now 41 years old) was originally incarcerated in 1986 at age 16 based on a conviction for armed robbery and felony murder in Chicago. *United States ex rel. Griffith v. Hullick*, 587 F. Supp. 2d 899, 902 (N.D. Ill. 2008). In 2008, a district court judge granted habeas relief in the Chicago case based on egregious prosecutorial misconduct. *Id.* at 912-13. The State of Illinois did not appeal the grant of the Writ and proceedings are now pending on remand in the Illinois courts.

³ Citations to the trial Report of Proceedings are to R.__; citations to the Post-Conviction Report of Proceedings are to PCR.__; citations to the Post-Conviction Common Law Record are to PCC.__; and citations to the Joint Appendix on Appeal in the Seventh Circuit are to JA__.

death on the first-degree murder conviction and 30 years imprisonment on the weapons conviction.

Griffith presented a number of substantial constitutional claims to the Illinois Supreme Court, including claims that he was deprived of the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronin*, 466 U.S. 648 (1984), and that his “decision” not to have the jury instructed on a lesser-included offense was not knowing, voluntary, and intelligent. In a 3-1-3 decision, the Illinois Supreme Court rejected Griffith’s claims without a majority opinion. (App. 90a-140a.) This Court denied Griffith’s Petition for Writ of Certiorari on October 17, 1994. (JA104.)

On March 31, 1995, Griffith filed a petition for post-conviction relief raising a number of constitutional claims. Through no fault of Griffith, his state post-conviction petition took years to litigate. On February 21, 2002, the post-conviction trial court conducted an evidentiary hearing during which each of the State’s three “eyewitnesses” recanted his trial testimony. Each witness testified that his trial testimony was false and that it was procured by the State through various threats, favors, and benefits. (PCR. 156, 172, 215, 222, 250, 256-59.) Griffith also demonstrated that the State failed to turn over significant *Brady* evidence, including the full criminal records of the State’s witnesses and the victim, as well as previously undisclosed deals and benefits offered and provided

to the State's witnesses in exchange for their trial testimony. (PCR. 153-56, 164-68, 210-11, 213-16, 218-19, 221, 238-39, 257-59, 264-70, 274-76, 287-90; PCC. 1020-23; JA163-64.)

Notwithstanding, on August 22, 2003, the state post-conviction trial court denied relief and entered judgment against Griffith. The Illinois Appellate Court affirmed on July 13, 2005. (App. 46a-98a.)

As required by Illinois rules in effect at the time, on August 1, 2005, Griffith timely filed his Notice of Intent to Appeal, making his Petition for Leave to Appeal ("PLA") to the Illinois Supreme Court due on August 17, 2005. (JA422.) Because of illness, Griffith's appellate counsel did not file the PLA on August 17. Instead, 14 days later, on September 1, 2005, counsel filed a Motion for Leave to File the PLA *Instantly*. (App. 146a-152a.) On September 13, 2005, the Illinois Supreme Court granted the Motion for Leave to File the PLA *Instantly*. (App. 152a.) Indeed, the Illinois Supreme Court's docket sheet reflects that the PLA was due and filed that day. On December 1, 2005, the Illinois Supreme Court denied Griffith's PLA on the merits. (App. 45a.)

B. The Federal Habeas Proceedings

Three hundred sixty-four days later, on November 30, 2006, Griffith filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Central District of Illinois. The State filed its Answer on February 9, 2007. Nothing of substance happened for more than one year. On

March 3, 2008, the district court granted permission for the undersigned counsel to appear and file an Amended Petition to supersede the Original Petition. Griffith filed his Amended Petition on August 15, 2008.

In his Amended Petition, Griffith asserted, among other things, that he received constitutionally deficient representation from counsel and that the State knowingly presented false testimony at trial and violated the *Brady-Giglio* rules. Griffith's claims all demonstrate that the Illinois state courts' decisions were contrary to clearly established federal law and resulted in a decision that was based on an unreasonable determination of the facts.

On December 5, 2008 – two years after the Original Petition was filed – the State sought leave to file a motion to dismiss the petition, arguing that Griffith's habeas petition was untimely because it was not “pending” for purposes of AEDPA's statute of limitations for the 14 days between August 17 (when the PLA was originally due) and September 1 (the day Griffith filed his Motion for Leave to File the PLA *Instantly*). The State asserted that it “inadvertently overlooked” this timeliness issue. Over Griffith's objection that the State was 22 months late in filing its motion to dismiss, the district court granted leave to file the motion to dismiss.

In opposition to the motion, Griffith explained that because leave to file *instantly* was granted, his

PLA was timely under established Illinois law. Griffith also reiterated that he was actually innocent because the new evidence presented during his post-conviction proceedings showed that the State's three "eyewitnesses" testified falsely at trial. Griffith supported his claim of actual innocence with sufficient indicia of reliability through, among other things, the uncontroverted affidavit of the lawyer for one of the State's witnesses attesting to the fact that there existed an undisclosed *quid pro quo* agreement between the witness and prosecutor. (JA163-64.) The district court nevertheless dismissed Griffith's petition as untimely.⁴

Ignoring Illinois case law demonstrating that Griffith's PLA was indeed timely under state law – and therefore should have been considered "pending" for the purpose of the statute of limitations – the district court determined that *Carey v. Saffold*, 536 U.S. 214 (2002), was inapplicable because *Carey* only applied to a timely filed state post-conviction petition. The district court denied Griffith's motion for reconsideration on June 4, 2009 and denied

⁴ As three Seventh Circuit judges noted in their dissent from the decision denying *en banc* review, the district court ironically exercised its discretion to allow the state's 22-month late assertion of the statute of limitations defense, giving the State's motion full retroactive effect, "which allowed a new defense based on *not* giving retroactive effect to the state court's decision to grant an earlier retroactive extension of time." (App. 10a.)

Griffith's Application for a Certificate of Appealability on June 12, 2009. (App. 20a-26a, 143a-45a.)

C. Proceedings Before The Seventh Circuit.

1. Certificate of Appealability.

The Seventh Circuit granted a Certificate of Appealability, permitting Griffith to brief the timeliness issues and finding that "Griffith has made a substantial showing of the denial of his constitutional rights, including the denial of his right to due process, violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and deprivation of effective assistance of trial and appellate counsel." (App. 141a-42a.)

2. The Seventh Circuit Opinion.

The Seventh Circuit affirmed the district court decision that Griffith's federal habeas petition was untimely. (App. 13a-19a.) According to the court, the Illinois Supreme Court decision granting Griffith leave to file his PLA *instanter* did "not have retroactive effect" for the purpose of federal law. (App. 17a.) The Seventh Circuit stated that whether the proceeding was "pending" for the 14 days was a question of federal law, and that *nothing* the Illinois Supreme Court did – or could do – would render the PLA "pending" during that 14-day period. (App. 17a.)

With regard to Griffith's "actual innocence" contention, the Seventh Circuit – relying on its opinion in *Escamilla v. Jungwirth*, 426 F.3d 868 (7th Cir. 2005) – reaffirmed that even where a habeas petitioner presents a credible showing of actual innocence, he is nevertheless subject to AEDPA's time limitations. (App. 18a.)

3. The Dissent to the Order Denying Rehearing *En Banc*.

Griffith filed a petition for rehearing or rehearing *en banc*, asserting in relevant part that the Seventh Circuit's decision: (a) was in direct conflict with this Court's decisions in *Carey*, 536 U.S. 214, and *Evans v. Chavis*, 546 U.S. 189 (2006), (b) was inconsistent with other Seventh Circuit decisions and the decisions of other circuits requiring federal courts to look to state law to determine whether a state post-conviction petition is timely and pending, and (c) improperly substituted its own incorrect interpretation of Illinois law when it concluded that Griffith's PLA to the Illinois Supreme Court was not timely.⁵

⁵ Griffith later suggested via a letter filed pursuant to Federal Rule of Appellate Procedure 28(j) that, if the Seventh Circuit had any question or doubt about the meaning of the state procedures, the Seventh Circuit could certify to the Illinois Supreme Court the question of whether the "instante" order made the PLA timely under

The panel denied the petition for rehearing and a majority of the court did not favor rehearing *en banc*. (App. 1a-2a.) However, three judges dissented from the denial of rehearing *en banc*. (App. 2a-12a)

The dissent properly states that under this Court's dictates in *Carey* and *Evans*, federal courts are required to "give the state court's decision on timeliness the same effect the state courts did." (App. 3a.) The dissent also concludes that correcting the panel's erroneous ruling deserved *en banc* consideration "because the general problem – the proper calculation of the federal limitations period when a petitioner has missed a deadline in the state courts, but the state courts have excused the delay – is a recurring issue in the district courts and for us." (App. 3a.)

Specifically, the dissent identified three errors in the panel's conclusion that there was nothing actually "pending" during the 14 days at issue and therefore the statute of limitations was not tolled for that time period:

First, the conclusion is inconsistent with the reasoning of the Supreme Court in *Carey* and its follow-up case, *Evans v. Chavis*, 546 U.S. 189 (2006), and more generally with the Supreme

state law. The Seventh Circuit did not act upon this request.

Court's approach to a closely-related question in *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009).

Second, the panel conclusion produces a confusing solution that sets unnecessary traps for unwary petitioners and their lawyers.

Third, the panel conclusion winds up being over-protective of a state's interests when the state court has found no need for such protection.

(App. 4a-5a.)

According to the dissent, the better approach is that "when a state court deems timely a request for further appellate review, the federal courts should treat the relevant state court petition as having been pending throughout the entire period of state court review, without having to go back and look for potential 'gaps' in the state courts' process." (App 5a.)

With regard to Griffith's request that the Seventh Circuit decide *en banc* whether a demonstration of "actual innocence" requires review of the merits of his habeas claim without regard to AEDPA's statute of limitations, the dissent stated that there is already a circuit split on the question and the "issue is now ripe for Supreme Court resolution." (App. 12a.)

REASONS FOR GRANTING THE PETITION

This case presents the opportunity for this Court to address two important and recurring issues on which the Seventh Circuit's positions conflict with this Court's prior decisions, as well as the decisions of other circuits.

First, the Seventh Circuit decision regarding the important relationship between "timeliness" and "pendency" under AEDPA is incorrect and conflicts directly with this Court's decisions in *Carey*, 536 U.S. 214 and *Evans*, 546 U.S. 189. The Seventh Circuit's holding also conflicts with the approach taken by other circuits: federal courts must accept a state court's interpretation of its own rules. The Seventh Circuit's holding improperly permits federal courts to substitute their own interpretation of state rules on timeliness. Also, as noted by the dissent of the three judges who voted to grant rehearing *en banc*, the Seventh Circuit's opinion sows confusion for federal habeas petitioners attempting to ascertain when their statute of limitations begins, potentially lapses, resumes, and ultimately ends.

Second, even if Griffith's habeas petition were untimely, this case squarely raises the issue – upon which the circuits have split – of whether a petitioner who demonstrates a credible claim of actual innocence is entitled to review of the merits of his habeas claim regardless of AEDPA's statute of limitations. The Seventh Circuit's decision that an untimely habeas petition does not warrant review on

the merits even where the petitioner makes a credible claim of actual innocence directly conflicts with the holdings of the Sixth and Tenth Circuits. Because Griffith presents in his habeas petition a credible claim of actual innocence under the standard of *Schlup v. Delo*, 513 U.S. 298 (1995), the district court should have reached the merits (or at least permitted discovery and an evidentiary hearing), regardless of the timeliness of Griffith's petition.

I. This Court Should Grant Review To Clarify That State Law – Not Federal Law – Determines Whether State Court Proceedings Were “Timely” And Therefore “Pending” For The Purpose Of AEDPA’s Statute Of Limitations.

AEDPA's one-year statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review . . . is pending.” 28 U.S.C. § 2244(d)(2). To determine whether an application for post-conviction relief was “pending” in state court, this Court has ruled that federal courts must determine whether the petition was “properly filed” and “timely” under state law. *Evans*, 546 U.S. at 198; *Carey*, 536 U.S. at 226.⁶

⁶ The Seventh Circuit properly ruled – and there is no dispute – that Griffith's PLA was “properly filed.” (App. 18a.)

The Seventh Circuit decision here directly conflicts with this Court's dictates in *Carey* and *Evans*. The Seventh Circuit essentially says that it does not matter if the Illinois Supreme Court granted a retroactive extension of time and considered the PLA timely, because no matter what the state court did, the proceedings were not "pending" for the 14 days between the PLA's original due date and the day he sought leave to file the PLA *instantly*. (App. 16a-17a.) This departure from the dictates of *Carey* and *Evans* abandons the principles of comity and federalism that are at the heart of AEDPA. The Seventh Circuit reasons that "[t]he meaning of 'pending,' a term in a federal statute, is a question of federal law," and thus federal courts have the ability to interpret state law in a way that conflicts with the State's own interpretation. (App. 17a.) Because the Seventh Circuit decided this important federal question in a way that conflicts with the relevant decisions of this Court and other circuits, certiorari should be granted.

A. Supreme Court review is necessary to clarify that federal courts must apply state timeliness rules to determine whether a state post-conviction petition remained "pending."

The purpose of AEDPA's time limitation is to give the state courts the opportunity to address claims before a petitioner turns to the federal courts for relief. As the dissenting judges noted, federal courts must "give the state court's decision on timeliness the same effect the state courts did" to determine

whether a post-conviction petition remains pending for the purpose of AEDPA's statute of limitations. (App. 3a.) The Seventh Circuit, however, ignored the Illinois Supreme Court rules and decisions and concluded that nothing the Illinois Supreme Court did could make Griffith's PLA timely.⁷ (App. 16a-17a.) The Seventh Circuit's failure to defer to state law and its hyper-technical reading of the word "pending" creates an anomalous system under which a petitioner could have a state post-conviction petition pending in the Illinois Supreme Court while his time to file a federal habeas petition is simultaneously running out.

The Seventh Circuit stated:

According to Griffith, leave to file *instanter* means that the petition is timely as a matter of state law. That is not what the state court said, however. A decision to accept a document *instanter* (law Latin for "right now" or "immediately") does not make it timely; it just means that the document will be considered on the merits.

⁷ The Seventh Circuit also ignored the Illinois Supreme Court's docket sheet demonstrating that the PLA was ultimately due and filed on September 13, 2005 – the day the court granted leave to file *instanter*.

(App. 16a.) This statement totally disregards Illinois law. In ruling on Griffith's motion for leave to file *instante*, the Illinois Supreme Court said, "Motion allowed." (App. 152a.) There was no need for the Illinois Supreme Court to state explicitly that the petition was timely because under established Illinois law, allowing the motion for leave to file *instante* meant that it was timely.

As the dissent explained, under *Carey* and *Evans*, the issue is "whether Griffith's appeal was actually timely under state law." (App. 7a (internal citations omitted).) It was. Illinois Supreme Court Rule 315 – the Rule that sets the time limit to file a PLA – provides that the court, "or a judge thereof, on motion, may extend the time for petitioning for leave to appeal . . . in the most extreme and compelling circumstances." Ill. Sup. Ct. Rule 315(b)(1). Griffith's counsel – who had been ill – filed his motion for leave to file the PLA *instante* under Rule 315(b). (App. 146a-151a.) Significantly, it is well established under Illinois law that the Supreme Court may grant leave to file *instante*. *Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP*, 828 N.E.2d 216, 221 (Ill. 2005); *Pitsch v. Cont'l & Commercial Nat. Bank of Chicago*, 305 Ill. 265, 267 (1922). In *Pitsch*, the Illinois Supreme Court held that where the appellant sought leave to file an appeal bond *instante*, "the order approving the filing of the appeal bond and permitting it to be filed was in effect an extension of the time for filing the bond." 305 Ill. at 267.

In defining the period when a state court proceeding is “pending” under AEDPA, the Seventh Circuit stated that “state courts’ decisions do not have retroactive effect.” (App. 17a.) At the same time, the court specifically conceded that under Illinois law, Illinois courts do issue orders whose effect is to retroactively fill gaps caused for any number of reasons.⁸ (App. 17a.) For example, in *Wauconda*, the Illinois Supreme Court explained that an extension under Rule 315(b)(1) may be made retroactively by granting leave to file a PLA *instantly*. 828 N.E.2d at 221 (citing 177 Ill.2d R. 315(b)). According to the Illinois Supreme Court, by granting leave to file *instantly*, it extends a party’s deadline for filing its PLA. *Id.* The Illinois Supreme Court concluded that “the extension was appropriate” and the case was “properly before this court.” *Id.* at 223 (emphasis added). This preserved the Illinois Supreme Court’s jurisdiction to hear the appeal in *Wauconda*. *Id.*

⁸ The Seventh Circuit wrongly concluded that a decision by the Illinois Supreme Court to accept a late filing and a decision to grant leave to file *instantly* are identical. (App. 17a.) As a jurisdictional matter, the Illinois Supreme Court distinguishes between a late-filed PLA and a PLA filed *instantly*. *Wauconda*, 828 N.E.2d at 223. That is, the court has the power to dismiss the late-filed PLA on jurisdictional grounds, but does not have that power when the court grants leave to file the PLA *instantly*. *Id.*

Where, as here, the state court has a procedure to give retroactive effect to its decisions, the federal courts must give the same effect to the state decision when calculating timeliness. Because the state court deemed Griffith's PLA timely, under *Carey* and *Evans* it remained pending until the Illinois Supreme Court denied his PLA on the merits on December 5, 2005.

As this Court previously explained, “[i]f the filing of the appeal is timely, the period between the adverse lower court decision and the filing . . . is not counted against the 1-year AEDPA time limit.” *Evans*, 546 U.S. at 192. The Seventh Circuit's conclusion to the contrary makes it apparent that clarity on this issue is still necessary. Accordingly, this Court should grant review to clarify that federal courts must look to a state's interpretation of its own law to determine whether a state court filing was timely filed.⁹

⁹ We respectfully suggest that the Court might make best use of its finite resources by granting certiorari, summarily vacating the opinion of the Seventh Circuit, and remanding with instructions that Griffith's petition be considered on its merits. S. Ct. Rule 16.1. Alternatively, if the Court believes there is *any* question regarding the timeliness of the PLA under Illinois law, this Court may consider certifying the question to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 20. *See Zant v. Stephens*, 456 U.S. 410, 416-17 (1982) (certifying a question of Georgia law to the

B. The Seventh Circuit’s decision negating the ability of the Illinois Supreme Court to determine the “timeliness” of state filings conflicts with the approach taken by other circuits.

Each state has its own – sometimes unique – rules for the filing of pleadings and briefs. The Seventh Circuit’s holding that the Illinois Supreme Court’s determination that *instante*r filings cannot have retroactive effect for the purpose of AEDPA’s statute of limitations conflicts with the approach taken by other circuits which defer to state court determinations of their own rules.

The Eighth Circuit has recognized that whether a petitioner’s state court appeal was “pending” for purposes of AEDPA’s statute of limitations is a matter of federal law, but, in contrast to the Seventh Circuit, that federal law requires examination of the state court procedures. *Payne v. Kemna*, 441 F.3d 570, 571 (8th Cir. 2006); *see Drew v. MacEachern*, 620 F.3d 16, 21 (1st Cir. 2010) (“a state’s procedural rules control whether an application for state post-conviction relief is pending under §2244(d)(2)”). Likewise, the Sixth Circuit has held that “federal courts must accept a state court’s interpretation of

Georgia Supreme Court); Eugene Gressman et al., *Supreme Court Practice* 604 (9th ed. 2007); 1A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1:676 (L. Ed. 2010).

its statutes and its rules of practice.” *Israfil v. Russell*, 276 F.3d 768, 771 (6th Cir. 2001); *see also Jenkins v. Johnson*, 330 F.3d 1146, 1155 (9th Cir. 2003) *overruled on other grounds by Pace v. DiGuglielmo*, 544 U.S. 408 (2005). The Tenth Circuit has properly held “in the interest of comity and due deference . . . state law must determine when a state habeas petition is considered filed.” *Adams v. LeMaster*, 223 F.3d 1177, 1181 (10th Cir. 2000); *see also Wade v. Battle*, 379 F.3d 1254, 1260-61 (11th Cir. 2004) (deferring to the Georgia Supreme Court’s determination that the petitioner’s application for review was not “properly filed”); *Merritt v. Blaine*, 326 F.3d 157, 165-66 (3d Cir. 2003) (deferring to the state court’s holding that the post-conviction petition was untimely and therefore not properly filed under AEDPA); *Adeline v. Stinson*, 206 F.3d 249, 253 (2d Cir. 2000) (deferring to state law).

Similarly, in *Causey v. Cain*, 450 F.3d 601, 606 (5th Cir. 2006), the Fifth Circuit recognized the inconsistency that would result if it declined to apply state court interpretations of its filing deadlines: “we could be forced to hold that the time for state direct review had expired even where the Louisiana Supreme Court has explicitly held that a defendant’s application for direct review was timely filed as a matter of state law.”

The Seventh Circuit itself has recognized in other cases that the Illinois Supreme Court is the “master of its own rules” and that whether a state pleading is timely is governed by those rules. *Wilson v. Battles*,

302 F.3d 745, 747 (7th Cir. 2002) (“The issue of whether a post conviction petition is pending for habeas purposes is governed by state law.”); *Jefferson v. Welborn*, 222 F.3d 286, 288 (7th Cir. 2000).¹⁰ But here, the Seventh Circuit abandoned this principle in a purported attempt to create a federal law of “pendency,” stating: “[t]he meaning of ‘pending,’ a term in a federal statute, is a question of federal law.” (App. 17a.) It is from this statement that the court concluded that state court decisions cannot have retroactive effect. (App. 17a.) Although “pending” is a term in a federal statute – as is the term “properly filed” – federal courts must look to state law to determine whether a post-conviction petition is timely and “properly filed.” If it is, it remains “pending” through the conclusion of the state proceedings. *Carey*, 536 U.S. at 220-21; see *Allen v. Mitchell*, 276 F.3d 183, 185 (4th Cir. 2001).

¹⁰ There is similar confusion within a number of other circuits. For example, the Eighth Circuit has held both that examination of state court procedures is necessary to determine when a post-conviction petition is pending, and that independent review by federal courts without regard to state rulings is appropriate. Compare *Payne*, 441 F.3d at 571-72 (deferring to state court procedures to determine when the state post-conviction petition was pending), with *Lewis v. Norris*, 454 F.3d 778, 780 (8th Cir. 2006) (even where a state court treats a state petition as timely, federal courts are to determine independently whether the state court proceedings were timely).

By declining to give proper effect and respect to Illinois law on timeliness and procedure, the Seventh Circuit conflicts with the other circuits. Accordingly, the issue of whether federal courts must look to state law to determine if a post-conviction petition remains “pending” for the purpose of AEDPA’s statute of limitations is appropriate for Supreme Court resolution.

C. Applying a state’s interpretation of its own timeliness rules is necessary to provide clarity to federal habeas petitioners.

The Seventh Circuit’s decision undermines AEDPA’s guiding principles of comity and federalism, and throws the law regarding the statute of limitations into a state of disarray. *See Carey*, 536 U.S. at 222. The Seventh Circuit deprives Illinois courts of the respect they are due and allows federal courts to decide for themselves – after-the-fact and contrary to state law – whether a state post-conviction petition was timely and therefore pending. This makes it extremely difficult for a habeas petitioner to know in advance of filing his habeas petition what time will be counted against him. That is, will the federal court follow the state court’s interpretation of its procedural rules, or will it (as the Seventh Circuit did here) make up its own rules?

Under the Seventh Circuit’s reasoning, habeas petitioners like Griffith find themselves in a difficult and confusing situation. As explained in the dissent, the court’s decision “sets unnecessary traps for

unwary petitioners and their lawyers” such that they have to go back through and dissect the state post-conviction process to look for potential “gaps” during which the statute of limitations may not have been tolled. (App. 5a.)

Adding to the confusion is the fact that the Seventh Circuit follows state law in certain instances but declines to do so in others. Although the Illinois rule with respect to the filing of a brief *instante* may be unique, there are many ways in which state court rules on timeliness come into play in the federal habeas context. For example, when determining the timeliness of a state court filing involving the “mailbox rule” (which deems a prisoner’s petition filed on the day he delivers it to prison officials), federal courts, including those in the Seventh Circuit, usually defer to the law of the state.¹¹ Some states – including Illinois¹² – apply the mailbox rule,

¹¹ Further adding to the confusion is the fact that two circuits – the Second and Ninth – often (but not always) apply the *federal* mailbox rule to the state filings regardless of state law. *See, e.g., Fernandez v. Artuz*, 402 F.3d 111, 115 (2d Cir. 2005) (“New York’s rejection of the mailbox rule does not preclude its application by a *federal* court in tolling a *federal* statute of limitations.”) (emphasis original); *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000) (federal mailbox rule also applied to state habeas petitions).

¹² *Sims v. Acevedo*, 595 F. 3d 774, 777 (7th Cir. 2010) (applying Illinois’ mailbox rule).

but others – like New Mexico¹³ – do not. Other states employ “mandate” rules,¹⁴ successive petition procedures,¹⁵ “gatekeeper justice” rules,¹⁶ and “escape clause” procedures.¹⁷ In each instance, federal courts give a high degree of respect and deference to the state rules and if the state rules make the filings timely, they are pending for

¹³ *Adams*, 223 F.3d at 1182 (declining to apply the mailbox rule because New Mexico law did not appear to recognize the rule).

¹⁴ *Compare Wilson*, 302 F.3d at 747 (explaining that the petitioner was not entitled to tolling for the days after his PLA was denied but before the mandate issued because Illinois did not apply the mandate rule), *with Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001) (providing petitioner with the benefit of the days between the denial of his post-conviction petition and the date the mandate issued because Florida recognized the mandate rule).

¹⁵ *Israfil*, 276 F.3d at 771 (habeas petition was properly denied where petitioner failed to comply with Ohio’s successive petition requirements).

¹⁶ *Currie v. Matesanz*, 281 F.3d 261, 271 (1st Cir. 2002) (habeas claim was timely filed because Massachusetts’ requirement that the petitioner apply to a gatekeeper justice for an appeal had no time limit).

¹⁷ *Jenkins*, 330 F.3d at 1151-52 (petition was timely filed because state law contained an “escape clause” for claims that could not reasonably have been raised in an original or amended petition).

purposes of AEDPA until the conclusion of the state proceedings. That is what comity and federalism require.

Habeas petitioners must be able to rely on the fact that the federal court will follow the law of the petitioner's state. By looking for potential "gaps" in the post-conviction process after-the-fact, the Seventh Circuit created an unmanageable system. If, for example, the next petitioner in Griffith's position obtains from the Illinois courts an order granting leave to file his PLA *nunc pro tunc*, will another panel of the Seventh Circuit distinguish this case and hold that his petition was indeed "pending" under AEDPA? It is necessary for habeas petitioners and their counsel to be able to determine their federal filing deadlines without risk that state court orders will be reinterpreted *ex post facto*.

As the dissent stated, the Seventh Circuit should have looked to whether the state court treated the state filings as timely, and if it did, then the state post-conviction proceedings remained "pending." (App. 5a.) Not only does this properly balance "the interests served by the exhaustion requirement and the limitation period," *Duncan v. Walker*, 533 U.S. 167, 179 (2001), but it treats the state appellate process as a complete entity, thereby preventing the uncertainty about which the dissent warns. *See Carey*, 536 U.S. at 220; (App. 9a-11a.)

This Court should grant review to remove the confusion created by the Seventh Circuit's opinion.

II. Supreme Court Review Is Necessary To Resolve The Conflict In The Circuits Concerning Whether A Court Should Address The Merits Of An Otherwise Untimely Habeas Petition Where The Petitioner Establishes A Credible Claim Of Actual Innocence.

A. Review on the merits of the underlying constitutional issues in an otherwise untimely habeas petition is appropriate where the petitioner demonstrates a credible claim of actual innocence.

The circuits are in conflict on the issue of whether a petitioner who presents a credible claim of actual innocence is entitled to review on the merits of his underlying constitutional claims even where he fails to meet the timeliness requirement of AEDPA. Indeed, the dissent below states that this “issue is now ripe for Supreme Court resolution.” (App. 12a.)

The Seventh Circuit, relying on its decision in *Escamilla*, 426 F.3d at 871, reaffirmed that a habeas petitioner who demonstrates actual innocence cannot overcome his failure to comply with AEDPA’s one-year limitations period. (App. 18a.)

The Seventh Circuit’s decision conflicts directly with decisions of the Sixth and Tenth Circuits. In *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005), the Sixth Circuit found that where a petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty based on his showing of actual innocence, he should be

permitted to argue the merits of his underlying constitutional claims. The Sixth Circuit recognized the constitutional issues raised by absolute foreclosure of habeas relief to a man who is actually innocent and referenced decisions from other circuits acknowledging the serious constitutional problems raised by “denying federal habeas relief from one who is actually innocent.” *Id.* at 601 (citing cases from the Second, Third, and Eleventh Circuits).

In reaching this result, the Sixth Circuit noted that it was parting company with the Eighth Circuit’s decision in *Flanders v. Graves*, 299 F.3d 974, 976-78 (8th Cir. 2002):

We decline to adopt the approach outlined by the Eighth Circuit in *Flanders*, which imposes a requirement that the petitioner show “action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion or . . . that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations.” 299 F.3d at 978. . . . The *Flanders* exception would not cover situations as in this case where the petitioner had collected sufficient evidence to demonstrate a credible claim of actual innocence but failed to file within the one-year limitations period.

Souter, 395 F.3d at 601 n.16.

More recently, the Tenth Circuit ruled that “in the equitable tolling context . . . a sufficiently supported claim of actual innocence creates an exception to procedural barriers for bringing constitutional claims, regardless of whether the petitioner demonstrated cause for the failure to bring these claims forward earlier.” *Lopez v. Trani*, No. 10-1088, __F.3d__, 2010 WL 4923891, at *3 (10th Cir. Dec. 6, 2010). The Tenth Circuit concluded that where “a petitioner argues that he is entitled to equitable tolling because he is actually innocent, this argument is premised on the same fundamental miscarriage exception that was discussed by the Supreme Court in *Schlup* and *Coleman*” *Id.* *But see Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (tolling appropriate “when prisoner is actually innocent” and “diligently pursue[s] his federal habeas claims”).

Other circuits that have addressed the issue have held that the actual innocence standard does not apply to AEDPA’s limitations period, or, like the Seventh Circuit, does not apply in the absence of a showing of diligence or cause for the delay. *See Lee v. Lampert*, 610 F.3d 1125, 1134 (9th Cir. 2010) (discussing circuit split); *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003) (habeas petitioners “who may be innocent are constrained by the same explicit statutory or rule-based deadlines as those against whom the evidence is overwhelming”).

B. The Seventh Circuit's refusal to review the merits of a habeas claim where the petitioner makes a credible showing of actual innocence is wrong for the reasons set forth in *Schlup v. Delo*, 513 U.S. 298 (1995).

Prior to the enactment of AEDPA, this Court held that a claim of actual innocence can be raised to avoid a procedural bar to the consideration of the merits of the habeas petitioner's constitutional claims. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "[T]he individual interest in avoiding injustice" reflects a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 324-25 (internal quotations omitted). Contrary to the reasoning of the First, Seventh, and Ninth Circuits, this Court has reaffirmed that the *Schlup* gateway applies even to procedurally defaulted claims to avoid "manifest injustice." *House v. Bell*, 547 U.S. 518, 536-37 (2006) (procedural bars "must yield to the imperative of correcting a fundamentally unjust incarceration") (internal quotations omitted).

In *Schlup*, this Court held that where a habeas petitioner presents evidence of his "innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." 513 U.S. at 316. The threshold inquiry is whether "new facts raise[] sufficient doubt

about [the habeas petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327.

Griffith's case is the rare case contemplated in *Schlup* where the petitioner has presented evidence raising sufficient doubt about his guilt so as to undermine confidence in the result of his trial. The sole evidence at trial supporting Griffith's conviction for first degree murder was the "eyewitness" testimony of three inmates who testified that Griffith was the initial aggressor during the fight. During the post-conviction proceedings, all three "eyewitnesses" recanted their trial testimony and attributed their false trial testimony to repeated pressure, coercion, and promises of benefits and leniency from the State.¹⁸ (PCR. 156-64, 183-84, 215-16, 222, 232, 244, 255-61, 279-83.) Without the

¹⁸ The post-conviction trial court and the Illinois Appellate Court wrongly denied Griffith's claim with respect to the recanted testimony because each court improperly required the recanted testimony to affirmatively prove that Griffith acted in self defense. (JA177, 324-25.) The recanted testimony instead demonstrated that none of the State's eyewitnesses actually saw the events to which they testified at trial. (PCR. 150-51, 194, 251, 264-65, 286.)

testimony of these three witnesses, the State had *no* evidence to support a first degree murder conviction.

Not only was the trial testimony of the State's "eyewitnesses" false, but the State failed to disclose material evidence relating to the benefits and leniency provided in exchange for the false testimony. The new evidence presented by Griffith, including the affidavits and testimony from each "eyewitness," is supported by sufficient indicia of reliability in the form of records from the IDOC master file of one of the witnesses – Bernie Cleveland – confirming he was released early from prison despite his perpetual disciplinary problems.¹⁹ (PCC. 1167.) More importantly, Griffith presented the uncontroverted affidavit from Cleveland's counsel attesting to the fact that there existed a *quid pro quo* agreement between Cleveland and the prosecutor in Griffith's case. (JA163-64.) Griffith therefore satisfies *Schlup*'s "more likely than not" standard. *See Souter*, 395 F.3d at 593 n.8 ("A prosecution witness recanting his trial testimony certainly falls under that scope" of the *Schlup* standard); *see also Schlup*, 513 U.S. at 330 ("the

¹⁹ The post-conviction trial court inexplicably denied Griffith's motion to review the IDOC files for the State's other two witnesses. (PCC. 155-57, PCR. 310-13.) In the district court, Griffith filed a Conditional Motion for Discovery and/or an Evidentiary Hearing seeking, among other things, review of the IDOC files of the State's other two witnesses. The district court denied the motion.

newly presented evidence may indeed call into question the credibility of the witnesses presented at trial”).

The discrete question concerning the effect of actual innocence on AEDPA’s statute of limitations will not be resolved by additional debate among the Circuits. Accordingly, this Court should grant review and resolve the conflict.

CONCLUSION

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

Respectfully submitted,

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