No. 10-980

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

REPLY TO BRIEF IN OPPOSITION

PAUL M. SMITH
DAVID W. DEBRUIN
Of Counsel
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
(202) 639-6000

JEFFREY D. COLMAN
Counsel of Record
ANNE P. RAY
MICHAEL H. MARGOLIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
jcolman@jenner.com

Counsel for Petitioner

Blank Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

Like many cases governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), this is a case about federalism and comity. But, as Respondent concedes, the Seventh Circuit ruled that it did not matter what the Illinois Supreme Court did when it granted Petitioner Evan Griffith's motion to file his petition for leave to appeal *instanter*. (Opposition at 27.) The Seventh Circuit concluded that – even in cases like this one – where the state court considered the PLA "timely," principles of federalism and comity do not require deference to the state court's ruling. (App. 17a.) The Seventh Circuit's decision is squarely in conflict with the decisions of this Court in *Carey v. Saffold*, 536 U.S. 214 (2002) and *Evans v. Chavis*, 546 U.S. 189, (2006) and the holdings of other circuits. It also runs afoul of this Court's decisions in *Jiminez v. Quarterman,* 129 S. Ct. 681 (2009) and *Walker v. Martin*, 131 S. Ct. 1120 (2011), which make clear that the principles of federalism and comity require deference to state court procedural rules. This is – and should be – the case whether the state procedural rules help or hurt petitioners.

Three judges on the Seventh Circuit dissented when rehearing *en banc* was denied. (App. 1a – 12a.) That dissenting opinion explains why the writ of certiorari should be granted. Three amicus briefs – filed in support of the Petition – also show why this Court should grant review.

Strangely, in his Opposition, Respondent never once mentions the dissenting opinion or makes any mention of the amicus briefs filed in support of certiorari. And, most striking, in his 34-page Opposition, Respondent never once uses the words "federalism" or "comity," or attempts to explain how ignoring the well-established timeliness rules of the Illinois Supreme Court can be reconciled with those bedrock principles.

Instead of addressing these critically important matters, Respondent re-writes the Questions Presented and repeatedly mischaracterizes the decisions of this Court and the circuit courts. The Opposition itself demonstrates why review is warranted, or why this Court should consider granting certiorari, vacating the Seventh Circuit's opinion, and remanding for consideration on the merits of Griffith's habeas corpus petition.

ARGUMENT

I. Respondent's Opposition Illustrates Why This Court Should Grant Review to Clarify That State Law – Not Federal Law – Controls Whether A State Court Petition Is Timely Filed.

A. The Seventh Circuit's Decision is Inconsistent With Decisions of This Court.

Respondent attempts to avoid the first Question Presented by re-writing it and then

conflating the question of whether a state court can, under state law, retroactively make timely a petition pending in the state court with the question of whether federal law permits retroactive tolling of AEDPA's statute of limitations. (*See* Opp. at 16.) As noted in the dissent, "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.)

Under *Carey* and *Evans*, the question is whether Griffith's post-conviction petition was timely under state law. Governing principles of federalism and comity require that if the state court petition was timely – and here it was treated as such by the Illinois Supreme Court – then it remained pending for purposes of AEDPA's statute of limitations for the entire time the "state collateral review process [wa]s '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.'" *Carey*, 536 U.S. at 219-20.

Respondent never addresses the concept of the state collateral review process as a complete entity and instead devotes the majority of his brief to the irrelevant question of whether retroactive tolling of AEDPA's statute of limitations is appropriate under federal law. Respondent contends that the Seventh Circuit correctly determined that the AEDPA

limitations period does not remain tolled "even if the state court decides to treat the untimely appeal as timely for state law purposes." (Opp. at 16.) Respondent's position is totally contrary to this Court's holdings in *Carey* and *Evans* and ignores the important principals of federalism and comity.[1]

Respondent's position is also inconsistent with this Court's decisions in *Jiminez v. Quarterman* and *Walker v. Martin*, both of which deferred to state procedural law. In *Jimenez*, this Court explained that the state court's order "granting an out-of-time appeal restore[d] the pendency of the direct appeal," which, in turn reset AEDPA's statute of limitations. 129 S. Ct. at 686. As the dissenters below explained, *Jimenez* "authorized an even greater retroactive 're-set' under section 2244(d)" and held that "the state courts' actions had the retroactive effect of making what had once been a final decision by the state courts no longer final for federal purposes." (App. 8a - 9a.) The dissenters concluded that "federal courts should give the same retroactive effect to th[e] state court decision when calculating timeliness under section 2244." (App. 9a.)

Similarly, Respondent wrongly suggests that *Walker* is immaterial here because *Walker* "was a case about procedural default." (Opp. at 24.) This

---

[1] As the Amicus Brief of Academics and Former State and Federal Judges explains, respect for state court procedural decisions is fundamental for our dual system of government. (Amicus Br. at 10-12.)

Court in *Walker*, relying upon the principles of federalism and comity, stated: "Sound procedure often requires discretion to exact or excuse compliance with strict rules, and we have no cause to discourage standards allowing courts to exercise such discretion." 131 S. Ct. at 1130. Respondent urges the opposite – that federal courts ignore the Illinois Supreme Court's exercise of its sound discretion.

Respondent's arguments distract from the real issue, namely, when a state court determines that it is appropriate to retroactively extend the time during which a petitioner is allowed to file his state post-conviction petition – rendering his state post-conviction petition timely – the federal courts must defer to that determination. As explained in the dissenting opinion, "to the extent that *Carey* left any doubt as to whether state law controls any pendency analysis under the habeas tolling provision, *Evans* dispelled that doubt." (App. 6a.) Either the state post-conviction petition is timely, or it is not. And if it is, then it is treated as timely for federal law purposes and that should be the end of the inquiry. *See Evans*, 546 U.S. at 197.

Respondent's attempt to reconcile the Seventh Circuit's decision with *Carey* and *Evans* falls far short and demonstrates why review by this Court is warranted. Respondent pulls one line out of *Carey* to conclude that the Seventh Circuit's decision is consistent: this Court's decisions "recogniz[e] §2244(d)(2)'s purpose of 'encouraging prompt filings

in federal court in order to protect the federal system from being forced to hear stale claims.'" (Opp. at 16 quoting *Carey*, 536 U.S. at 226.) Respondent ignores the actual holding in *Carey*, the rest of this Court's language and, most importantly, the principles of federalism and comity that motivated *Carey* and *Evans*.

The point of Griffith's request is that *no* days ran untolled for purposes of AEDPA. Because Griffith's post-conviction petition was treated as timely under state law, his post-conviction proceedings remained "pending" until the Illinois Supreme Court denied his PLA on the merits. *Carey*, 536 U.S. at 220. The import of *Carey* and *Evans* is that it was inappropriate for the Seventh Circuit to go back, after the fact, and dissect the time between the levels of appeal in state court, as that does not respect the finality of a state court judgment or a state's own decision about what is and is not timely. *See id.* at 220-21. As the dissenting opinion noted, that can cause havoc for lawyers and the courts. (App. 9a – 10a.)

The Amicus Brief of the McArthur Justice Center, the National Association of Criminal Defense Lawyers, and others explains that failing to defer to state law creates a trap for petitioners and their counsel. (Amicus Br. at 15-19.) Respondent attempts to minimize this trap by arguing that a petitioner who fails to timely seek post-conviction relief may still exhaust his state remedies by filing an out-of-time appeal in state court. (Opp. at 25.)

However, where an appeal is timely under state law, a petitioner must be able to rely on state law when calculating his federal statute of limitations. The trap exists when a federal court changes the rules after the fact.

B. Illinois Law Is Clear – Granting Leave To File *Instanter* is a Retroactive Extension of the Filing Deadline.

Unable to find support for the position that a state court may not retroactively extend the time for filing a state court petition, Respondent contends that certiorari is inappropriate here because this case turns on a "disputed point of state law." (Opp. at 26.) This is flat-out wrong. To begin, it is beyond any doubt that the Illinois Supreme Court treated Griffith's PLA as timely and then denied it on the merits. Illinois case law is clear that when an Illinois court grants leave to file *instanter*, it is a retroactive extension of the time to file. *See Pitsch v. Cont'l & Commercial Nat. Bank of Chi.*, 305 Ill. 265, 267 (1922) ("the order approving the filing of the appeal bond and permitting it to be filed [*instanter*] was in effect an extension of the time for filing the bond"); *Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 424 (Ill. 2005) ("[A]n order was entered granting the County's motion [for leave to file *instanter*], the effect of which was to extend the County's deadline for filing its petition for leave to appeal"). *See also* Ill. Sup. Ct. Rule 315(b)(1). Respondent does not – and has never – cited any Illinois law to the contrary.

Moreover, Respondent embellishes what is considered "state law." Respondent's argument relies on the *Seventh Circuit's* statement that under Illinois law, the granting of leave to file *instanter* did not amount to a retroactive extension of time and instead was just the court accepting a late appeal. (Opp. at 26-28.) But, the Seventh Circuit's statement that "state courts' decisions do not have retroactive effect" and the suggestion that the Illinois court considered Griffith's post-conviction petition "late" is simply incorrect. (App. 17a.)

Under Illinois Supreme Court Rule 315(b)(1), which Respondent ignores, 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." That is precisely what happened here. Accordingly, the 14 days at issue were treated exactly the same as the preceding 35 days, and thus were days during which a properly filed application was "pending."

C. Respondent's Contention That There is no Conflict Among the Circuits Misreads the Record and Misstates the Law.

In an effort to minimize the conflict among the circuits created by the Seventh Circuit's decision, Respondent asserts that Griffith's post-conviction petition was an "otherwise untimely" appeal that the state court chose to treat as timely. (Opp. at 23.) Again, Respondent's argument confuses and

distracts from the real issue. Each state has its own rules on timeliness and procedure. Under the governing principles of federalism and comity, federal courts should defer to state court determinations of their own rules. The Seventh Circuit did not do that here.

Contrary to Respondent's contention, other circuits take the approach that "federal courts must accept a state court's interpretation of its statutes and rules of practice." *Israfil v. Russell*, 276 F.3d 768, 771 (6th Cir. 2001). Prior Seventh Circuit decisions recognize that state courts are the "masters" of their own rules and whether a state pleading was "timely" is governed by those rules. *Wilson v. Battles*, 302 F.3d 745, 747 (7th Cir. 2002); *Jefferson v. Welborn*, 222 F.3d 286, 288 (7th Cir. 2000). The Seventh Circuit abandoned these principles in Griffith's case.

That Respondent – or the Seventh Circuit – says that Griffith's post-conviction petition was "otherwise untimely" does not make it so. Griffith followed an established Illinois procedure for seeking an extension of time, and he was granted the extension of time within which to file his post-conviction petition. Under Illinois law, his petition was timely as a result, and it was treated as timely. In the cases Respondent cites, the federal courts deferred to the state court's decisions on timeliness – indeed, the interests of comity and federalism so dictate. *Adams v. LeMaster*, 223 F.3d 1177, 1181 (10th Cir. 2000). In the cases cited by Respondent

except *Allen v. Mitchell*, 276 F.3d 183, 185 (4th Cir. 2001), the court concluded that the state court would have considered (or did consider) the state court petition untimely and therefore dismissed the habeas petition.[2] The same deference, however, must hold true if the state court would have considered (or did consider) the state petition timely. That is, the petition must also be timely for the purpose of federal habeas review.

Every other circuit to have considered this issue has concluded that deference must be given to the state court decisions on procedure, including timeliness. The fact that the Seventh Circuit did not do so here warrants review by this Court.

II. Supreme Court Review Is Warranted To Resolve The Circuit-Split Regarding Whether A Court Should Address The Merits Of An Otherwise Untimely Habeas Petition Where The Petitioner Establishes A Credible Claim Of Actual Innocence.

The issue of whether a petitioner who establishes a credible claim of actual innocence is entitled to review on the merits of his federal habeas claim even where he fails to meet the timeliness

---

[2] The issue in *Allen* was whether there was an "unreasonable delay" under North Carolina law, which did not have a fixed appellate deadline. 276 F.3d at 186-87. The Fourth Circuit remanded to the district court to make that determination. *Id.* at 187.

requirements of AEDPA is ripe for review. Respondent does not dispute this. The dissenters in the Seventh Circuit said precisely that.[3] (App. 12a.) Instead, Respondent argues that this case is a poor vehicle for deciding the issue because, according to Respondent, Griffith cannot demonstrate his innocence. (Opp. at 29.)

Respondent improperly conflates the burden of pleading with the burden of proof. Griffith has made a strong threshold showing of his innocence. As set forth in his habeas corpus petition at great length and summarized in his Petition for Certiorari, all three "eyewitness" inmates who testified that Griffith was the initial aggressor during the fight recanted their trial testimony during the post-conviction evidentiary hearing. (Pet. at 30-31.) The "eyewitnesses" also attributed their false trial testimony to repeated pressure, coercion, and promises of benefits and leniency from the State, none of which was disclosed by the State. (PCR. 156-64, 183-84, 215-16, 222, 232, 244, 255-61, 279-83.)

Respondent dismisses the recanted testimony as unhelpful and incredible. (Opp. at 29-30.) But, Respondent ignores the fact that the state appellate court used the wrong legal standard with respect to what Griffith was required to show (Pet. at 30) and that the forensic evidence at trial was far from

---

[3] As further explained in the Amicus Brief filed by the Innocence Network, the circuits are in clear conflict on this issue. (Amicus Br. at 4-8.)

conclusive. (Seventh Cir. Br. at 9-10.) Most importantly, Respondent completely ignores the evidence corroborating the recanted testimony, namely, the 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 (PCC. 1167) and 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.) This new evidence presented by Griffith had sufficient indicia of reliability and raised "sufficient doubt about [Griffith's] guilt to undermine confidence in the result of the trial." *Schlup v. Delo*, 513 U.S. 298, 317 (1995).

Because this issue is ripe for Supreme Court review, this Court should grant review and resolve the conflict among the circuits.

III. Griffith's Petition Is Not Moot

Respondent also contends that this case provides a poor vehicle to decide either question presented because there is a chance it may become moot before a decision is reached as a result of Griffith's successive post-conviction petition pending in Livingston County in which he seeks re-sentencing.[4] Respondent's argument is yet another

---

[4] Griffith's sentence was enhanced by a prior conviction in Chicago, which was vacated by a

diversion from the real issues in this case. Respondent does not contend that this case is actually moot. (Opp. at 33-34.) This is not surprising, as there indisputably remains a case-or-controversy. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.* 528 U.S. 167, 189 (2000). Moreover, Respondent does not concede that Griffith is entitled to a new sentencing hearing.[5]

Essentially, Respondent argues on the one hand that Griffith's habeas petition should not be heard on the merits because it was filed too late, while simultaneously arguing that it should not be heard on the merits because it is premature. Respondent cannot have it both ways.

---

district court in 2008 based on egregious prosecutorial misconduct. *United States ex rel. Griffith v. Hullick*, 587 F. Supp. 2d 899, 912-13 (N. D. Ill. 2008). The State did not appeal.

[5] The double-standard with respect to the statute of limitations issue is apparent here as well. Griffith filed his successive post-conviction petition in Livingston County on March 17, 2009. The State's response was originally due on November 4, 2009. After obtaining a number of extensions (some *after* the deadline had passed), the State's response was most recently due on March 1, 2010. The State has not responded or sought another extension. Griffith's Motion for a New Sentencing Hearing is currently pending.

CONCLUSION

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

Respectfully submitted,

JEFFREY D. COLMAN
Counsel of Record
ANNE P. RAY
MICHAEL H. MARGOLIS
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654
(312) 222-9350
jcolman@jenner.com

PAUL M. SMITH
DAVID W. DEBRUIN
Of Counsel
JENNER & BLOCK LLP
1099 New York Avenue,
NW, Suite 900
Washington, DC 20001
(202) 639-6000

May 16, 2011