

CHASING FINALITY:
FEDERAL COLLATERAL RELIEF IN THE WAKE OF
Pace v. DiGuglielmo, 125 S. Ct. 1807 (2005)

I. INTRODUCTION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides the first statute of limitations on the filing of federal habeas corpus petitions by state defendants.¹ Persons in custody pursuant to a state court judgment must seek federal habeas relief within one year of the latest of four dates.² Most commonly, the statute of limitations runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.”³ The statute of limitations tolls, however, for “[t]he 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.”⁴ Last Term, the Supreme Court defined the term “properly filed,” holding in *Pace v. DiGuglielmo*⁵ that

1. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 21 & 28 U.S.C.); see *Clay v. United States*, 537 U.S. 522, 528 (2003) (“Prior to [AEDPA], no statute of limitations governed requests for federal habeas corpus . . . relief.”).

2. See 28 U.S.C. § 2244(d)(1)(A)–(D) (2000). The statute provides that:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id.

3. *Id.* § 2244(d)(1)(A).

4. *Id.* § 2244(d)(2) (emphasis added).

5. 125 S. Ct. 1807 (2005).

an untimely application for state collateral relief is never properly filed and cannot toll the federal habeas statute of limitations.⁶

Pace is a vigorous attack against delays that have characterized federal habeas review of state judgments for decades. Although the Court declared a bright-line rule that can be easily applied, *Pace* is in other ways unclear. Part II of this Note gives an overview of the relevant facts and procedural history; Part III briefly outlines the issues that gave rise to a statute of limitations on the filing of federal habeas corpus petitions by state defendants; and Part IV elaborates on the Court's application of AEDPA's statute of limitations and tolling provisions, makes suggestions for further implementation of the Court's holding, and argues that the Court's draconian position against untimely applications for state collateral review was taken to advance the finality of state judgments.

II. FACTS AND PROCEDURAL HISTORY

John Pace pled guilty to second-degree murder and possession of an instrument of crime in a Pennsylvania state court and was sentenced to life imprisonment without the possibility of parole in February 1986.⁷ On November 27, 1996, he filed a pro se petition for collateral review of his sentence under the Pennsylvania Post Conviction Relief Act (PCRA).⁸ The PCRA became effective in 1988 and was amended in November 1995 to include, for the first time, a one-year statute of limitations on postconviction petitions.⁹ The amended statute states that any postconviction petition, including a second or subsequent petition, shall be filed within one year of the date the petitioner's judgment becomes final, unless the petition falls under one of three exceptions.¹⁰ The statute of limitations went into effect on January 16, 1996.¹¹ Pace filed his PCRA petition well over one year after his conviction became final and approximately ten

6. *Id.* at 1814.

7. *Id.* at 1810.

8. *Id.*; 42 PA. CONS. STAT. ANN. §§ 9541-9545 (West 1998).

9. *Pace*, 125 S. Ct. at 1810.

10. A PCRA petition otherwise barred by the new time limit could be accepted for review on the merits if (1) governmental interference prevented filing, (2) new facts arise that could not have been discovered through due diligence, or (3) a new constitutional rule is made retroactive. 42 PA. CONST. STAT. ANN. § 9545(b)(1).

11. See 1995 Pa. Laws 1118.

months after the PCRA statute of limitations went into effect, but at the time of his filing “no Pennsylvania court had yet applied the PCRA statute of limitations to a petitioner whose conviction had become final prior to the effective date of the Act.”¹² AEDPA’s one-year statute of limitations was also in effect at the time of Pace’s filing, having been enacted in April 1996. Because the Third Circuit Court of Appeals had created a one-year grace period within which petitioners whose convictions had become final prior to the enactment of AEDPA could file a timely federal habeas application,¹³ he had five months, without tolling, to the April 1997 federal deadline. In July 1997, the Pennsylvania Court of Common Pleas dismissed Pace’s petition on its merits,¹⁴ without ruling on the timeliness of the application.¹⁵ Pace appealed in August 1997, approximately four months after the federal habeas grace period had run.¹⁶ In December 1998 the Superior Court of Pennsylvania held that Pace’s PCRA petition in the Court of Common Pleas and his petition in the Superior Court were both untimely.¹⁷ The court retroactively applied the PCRA limitations period to Pace’s application and held that his time for filing under the PCRA expired one year after his conviction became final.¹⁸ The state supreme court denied review in July 1999.¹⁹

In December 1999, Pace filed a pro se federal habeas petition in the District Court for the Eastern District of Pennsylvania.²⁰ Recognizing that AEDPA’s statute of limitation would bar Pace’s federal petition, the district court held that Pace was entitled to statutory tolling from the time he filed his PCRA petition in November 1996 to the time he received a final judgment on his petition in July 1999.²¹ The court reasoned that, because the PCRA time bar was unclear as it applied to Pace’s petition,

12. *Pace*, 125 S. Ct. at 1817 (Stevens, J., dissenting).

13. See *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998) (cited in *Pace v. Vaughn*, 151 F. Supp. 2d 586, 590 (E.D. Pa. 2001)).

14. See Brief for the Petitioner at 11, *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005) (No. 03-9627), 2004 WL 2945392.

15. *Id.*

16. *Id.* at 12.

17. *Vaughn*, 151 F. Supp. 2d at 589–90.

18. See *id.* at 589.

19. *Id.* at 590.

20. *Id.*

21. *Id.* at 594.

such bar could not prevent his application from being properly filed.²²

The Third Circuit Court of Appeals reversed. Relying on its own precedent, it concluded that when a state court deems a petition untimely, it is not properly filed.²³

The Supreme Court affirmed. In a 5-4 vote,²⁴ the Court held that a postconviction petition that is rejected by the state courts as untimely is not properly filed within the meaning of AEDPA.²⁵ The Court did not address the specific predicament Pace faced: that the timeliness rule was unclear. Instead, the Court announced a general rule that addressed whether the existence of judicially reviewable exceptions to a time limit could prevent a late application from being improperly filed. The Court held that “[i]n common understanding, a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more properly filed than a petition filed after a time limit that permits no exception.”²⁶ To hold otherwise would contravene AEDPA’s purpose, the Court reasoned, by allowing a state prisoner to toll the statute of limitations at will, simply by filing untimely state postconviction petitions.²⁷ The Court also held that a petitioner’s “reasonable confusion” about the timeliness of her application for state collateral relief would constitute “good cause” to file a federal habeas petition within AEDPA’s deadline, and to seek a “protective” stay and abeyance of the federal proceedings thus initiated to preserve the opportunity for federal review when state remedies are exhausted.²⁸

22. *Id.* at 590–94.

23. *Pace v. Vaughn*, 71 F. App’x 127, 128 (3d Cir. 2003) (citing *Merritt v. Blaine*, 326 F.3d 157 (3d Cir. 2003)).

24. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O’Connor, Scalia, Kennedy, and Thomas joined. Justice Stevens filed a dissenting opinion, in which Justices Souter, Ginsburg, and Breyer joined.

25. *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1810 (2005).

26. *Id.* at 1811–12 (internal quotation marks omitted).

27. *See id.* at 1812.

28. *See id.* at 1813–14. The Supreme Court also considered whether Pace was entitled to equitable tolling from the time he filed his PCRA petition to the time the state supreme court denied review of that petition. It held that a litigant seeking equitable tolling must establish that (1) she has been pursuing her rights diligently, and (2) some extraordinary circumstances stood in her way. *Id.* at 1814. Pace was denied equitable tolling because he failed to establish that he had been pursuing his rights diligently. The Court found that Pace waited too long after his claims were available to him to assert them in his PCRA petition, and that he also delayed after his PCRA proceedings became final before asserting his claims in

Justice Stevens dissented, arguing that the PCRA time bar operates like an ordinary procedural bar that precludes a prisoner from obtaining relief based on the merits of the claims made in a petition for collateral review, such as a bar against claims previously determined on the merits on direct appeal, or a bar against claims that the petitioner unjustifiably failed to raise on direct appeal. The Court had previously held that such rules could not prevent an application for collateral relief from being properly filed.²⁹ If this precedent were applied to Pace's case, the PCRA time bar could not cause his application to be improperly filed.³⁰ Justice Stevens reminded the majority that AEDPA was designed to streamline and simplify the federal habeas system, which had been characterized by indeterminate delays and shameful overloading, and argued that the majority's holding was unfaithful to those goals because it would inevitably subject district courts to a flood of protective filings.³¹ Justice Stevens would have held that an application for state collateral relief that is ultimately held to be untimely, based on judicial review of its claims, is properly filed and tolls the federal habeas limitations period unless there is explicit evidence that the application was filed as a dilatory tactic.³² He rebuffed the majority's concern that petitioners would intentionally postpone federal habeas proceedings by filing untimely petitions for state collateral relief as misguided, stating that a federal habeas petitioner's principal interest is in speedy federal review of her claims and in immediate relief from state incarceration.³³

federal court. *Id.* at 1815. Although the Court explained why Pace was not entitled to equitable tolling, it declined to address whether equitable tolling is applicable to AEDPA's statute of limitations. *Id.* at 1814 n.8. Equitable tolling is outside the scope of this Note, and is not discussed beyond this footnote.

29. *See id.* at 1817–21 (Stevens, J., dissenting) (citing *Artuz v. Bennett*, 531 U.S. 4 (2000)).

30. *See id.*

31. *Id.* at 1820–21 (citing *Hohn v. United States*, 524 U.S. 236, 264–65 (1998) (Scalia, J., dissenting)).

32. *Id.* at 1820 (Stevens, J., dissenting).

33. *See id.*

III. THE NEED FOR A FILING DEADLINE

Federal habeas corpus review of state judgments is the most controversial and friction-producing issue in the relation between the federal courts and the states.³⁴ Scholars have noted that “[t]here is an affront to state sensibilities when a single federal judge can order [the] discharge of a prisoner whose conviction has been affirmed by the highest court of a state.”³⁵ Traditionally, there was no statute of limitations on federal habeas review and the doctrine of laches did not apply.³⁶ A prisoner could postpone federal litigation for years and the district courts could release state prisoners at any time, thereby undercutting the finality of state judgments, and compromising a state’s ability to defend its judgments against collateral attack or retry the defendant should she be granted federal habeas relief.³⁷

The Supreme Court responded to this problem with Rule 9(a),³⁸ which became effective in 1977.³⁹ Rule 9(a) allowed district courts to dismiss a habeas petition if the state “ha[d] been prejudiced in its ability to respond to the petition by [the] delay in its filing.”⁴⁰ The rule was insufficient to quell concerns about delayed filing because it did not protect the state against federal habeas petitions filed and granted so late that the state was

34. 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4261 (2d ed. 1988).

35. *Id.* Chief Justice Rehnquist, author of *Pace*, held similar views. See *Snead v. Stringer*, 454 U.S. 988, 993–94 (1981) (Rehnquist, J., dissenting from denial of cert.) (“It is scarcely surprising that fewer and fewer capable lawyers can be found to serve on state benches when they may find their considered decisions overturned [on tenuous grounds] by the ruling of a single federal district court judge.”). Justice O’Connor has also expressed reservations concerning the writ. See *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (O’Connor, J.) (“Federal intrusions into state criminal trials [via the writ of habeas corpus] frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”).

36. See WRIGHT ET AL., *supra* note 34, § 4268.2.

37. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 6 (1997).

38. Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. app. (2000) (effective Feb. 1, 1977, Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334, and as amended thereafter).

39. WRIGHT ET AL., *supra* note 34, § 4268.2.

40. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (internal citation omitted).

prejudiced in mounting a retrial.⁴¹ Capital defendants were of particular concern because they had real motive to postpone execution by filing federal habeas petitions. Members of Congress complained that delays in seeking federal habeas relief attenuated the deterrent effect of the death penalty and stifled confidence in the criminal justice system.⁴² The problem with enacting a strict filing deadline was that it created tension with the habeas “exhaustion doctrine,” which requires persons in custody pursuant to a state court judgment to exhaust state remedies with respect to all claims before seeking federal habeas relief.⁴³ Some prisoners would not be able to exhaust state remedies in time to meet the federal deadline. Congress responded by enacting AEDPA and its one-year filing deadline.⁴⁴

AEDPA advances the principles of comity, finality, and federalism “to provide for an effective death penalty.”⁴⁵ Section 2244(d)(1)’s one-year time limit serves the finality of state court judgments while section 2244(d)(2)’s tolling provision gives the deadline the flexibility to accommodate the requirement that petitioners exhaust state remedies before seeking federal review.⁴⁶ Like any other statute of limitations, AEDPA was designed to compel petitioners to file within a reasonable time so that the state has a fair opportunity to defend.⁴⁷ The goal was to encourage promptness and diligence in the filing of habeas petitions and to promote repose, stability, and public confidence in the justice system by bringing finality to state judgments.⁴⁸

41. *See id.* (noting that Rule 9(a) did not permit dismissal of a habeas corpus petition if the state would be prejudiced in retrying the defendant).

42. *See* 141 CONG. REC. S7480 (daily ed. May 25, 1995) (letter to President Clinton from the attorneys general of several states, dated May 10, 1995, reprinted in full in the Congressional Record at the request of Senator Hatch) (“In our own states, we continue to experience endless appeals and continuous delay. We believe that such abuse of the criminal justice system produces a disrespect for the law, and serves to undermine deterrence. This is particularly true with respect to the enforcement of the death penalty.”).

43. *See, e.g.,* *Rose v. Lundy*, 455 U.S. 509, 510 (1982).

44. AEDPA did not pass with ease. It is the fruit of decades of federal habeas reform debate. *See* Tushnet & Yackle, *supra* note 37, at 4–12.

45. Pub. L. No. 104-132, 110 Stat. 1214, 1217 (1996) (codified as amended in scattered sections of 21 & 28 U.S.C.); *see* *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

46. *See* *Duncan v. Walker*, 533 U.S. 167, 179 (2001).

47. *See* 51 AM. JUR. 2D *Limitation of Actions* § 14 (2000).

48. *See id.* § 16; *see also* 141 CONG. REC. S7657 (daily ed. June 5, 1995) (remarks of Senator Dole) (“If we really want justice that is ‘swift, certain, and severe,’ . . . then

The main concern was delay in death penalty cases, but Congress placed the statute of limitations on all federal habeas cases.⁴⁹

IV. TOLLING THE FEDERAL DEADLINE

AEDPA is poorly drafted and difficult to interpret in light of the federal and state processes of collateral review in place at the time of its enactment.⁵⁰ The Supreme Court has observed that “in a world of silk purses and pigs’ ears, AEDPA is not a silk purse.”⁵¹ Shortly after AEDPA’s enactment, Professor Larry Yackle judged that the new law would require a “practical, problem-solving brand of construction” that achieves sensible results.⁵² The *Pace* Court’s application of the statute and procedural setup does not seem to meet Professor Yackle’s sensibleness requirement, particularly if it will result, as Justice Stevens warned, in an excess of protective filings in the federal district courts.⁵³ The remainder of this Note elaborates on the Court’s application of AEDPA’s limitation period in *Pace*, and suggests that district courts issue a stay of federal habeas proceedings when any reasonable jurist could find the application for state collateral relief timely under state law. It also attempts to provide a rationale for the procedure prescribed in *Pace*, arguing that the Court’s holding was made in the interests of finalizing state judgments.

A. Proper Filing

AEDPA’s tolling provision provides that “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment

we must stop the endless appeals and endless delays that have done so much to weaken public confidence in our system of criminal justice In America, today there is clearly a big disconnect between crime and punish [sic]. Our habeas reform proposal seeks to bridge this gap by imposing a 1-year filing deadline on all death row inmates, State or Federal.”)

49. See Pub. L. No. 104-132, 110 Stat. 1214, 1217 (1996) (codified as amended in scattered sections of 21 & 28 U.S.C.).

50. See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 381 (1996) (“[T]hat [AEDPA] takes the preexisting habeas landscape as its baseline . . . will be of vital significance for the interpretive task that lies ahead. That task will not be easy. The new law is not well drafted.”).

51. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

52. See Yackle, *supra* note 50, at 381–82.

53. See *Pace*, 125 S. Ct. at 1820–21 (Stevens, J., dissenting).

or claim is pending shall not be counted toward any period of limitation.”⁵⁴ The Supreme Court first defined the term “properly filed” in *Artuz v. Bennett*.⁵⁵ In *Artuz*, the petitioner argued that Bennett’s application for state collateral relief was not properly filed because it was subject to two procedural bars: first, a bar against raising an issue that had been “previously determined on the merits upon an appeal from the judgment,”⁵⁶ and second, a bar against raising a claim that was available on direct appeal but was not raised because of the defendant’s “unjustifiable failure.”⁵⁷ The Supreme Court rejected the argument that Bennett’s application was improperly filed, holding that “an application is properly filed when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.”⁵⁸ The Court distinguished between “conditions to filing,” which, if not met, precluded an application from being properly filed, and “conditions to obtaining relief” such as the procedural bars at issue in that case, which could not prevent an application from being properly filed.⁵⁹ It elaborated that conditions to filing usually prescribe, for example, “the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.”⁶⁰

The *Artuz* Court declared that applications that are delivered and accepted in compliance with state law governing filings are properly filed, and that procedural bars that function as conditions to obtaining relief cannot prevent an application from being properly filed. But the Court’s holding was less clear on the question of whether the phrase “when . . . delivery and acceptance are in compliance with the applicable laws and rules governing filings” meant that a determination of “properly filed” was governed by state law.⁶¹ *Artuz* can easily be read to accommodate varying requirements for invoking the tolling provision by giving states the authority to determine what

54. 28 U.S.C. § 2244(d)(2) (2000).

55. 531 U.S. 4 (2000).

56. N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2005).

57. *Id.* § 440.10(2)(c).

58. *Artuz*, 531 U.S. at 8 (second emphasis added) (internal quotation marks omitted).

59. *See id.* at 10–11.

60. *Id.* at 8 (emphasis added).

61. *Id.* at 8.

conditions to filing are required for an application for collateral relief to be properly filed. This reading of *Artuz* is supported by the Court's acknowledgment that "[i]n some jurisdictions the filing requirements also include . . . preconditions imposed on particular abusive filers or on all filers generally,"⁶² but that in other jurisdictions these filing requirements may not exist. Legal commentators have understood that, under *Artuz*, "properly filed" is governed by state law.⁶³ If, under *Artuz*, proper filing is governed by state law, then whether an application barred by a state statute of limitations could still be properly filed would depend on whether the statute of limitations is a condition to filing or a condition to obtaining relief under state law. In jurisdictions where a statute of limitations is nothing more than an ordinary procedural bar that prevents an applicant from obtaining relief on her claims, *Artuz* would permit the state to determine that the statute of limitations is a condition to obtaining relief that cannot prevent an untimely application from being properly filed. On the other hand, in jurisdictions where, under state law, a statute of limitations is not an ordinary procedural bar, *Artuz* would give the state authority to determine whether the statute of limitations is a condition to filing that, when not met, precludes and application from being properly filed.

Whereas *Artuz* could be read to accommodate such state-to-state variation in the requirements for tolling the federal limitations period, and specifically in the ability of a time-barred application to trigger the federal tolling provision, *Pace* declined to extend flexibility where a petition for state collateral relief is ultimately held to be untimely. The *Pace* Court declared that "time limits, no matter their form, are filing conditions."⁶⁴ It stated that "[f]or purposes of determining what are 'filing'

62. *Id.* at 8–9 (internal citations omitted).

63. See, e.g., Gary Knapp, *Supreme Court's construction and application of 28 USCS § 2244(d)(2), generally placing 1-year time limit on state prisoner's application for federal writ of habeas corpus*, 153 L. Ed. 2d 981, 985 (2004) ("[T]he Supreme Court has decided that . . . state law governs the issue whether an application for state [collateral] relief is 'properly' filed."); see also Brief for the Respondent at 29, *Pace v. DiGuglielmo*, 125 S. Ct. 1807 (2005) (No. 03-9627), 2005 WL 226923 ("The tolling provision of § 2244(d)(2), to be sure, is an exception to the [§ 2244](d)(1) limitation. Congress wanted to maintain some opportunity for additional exhaustion in state court before proceeding to federal court—but only to the degree that states themselves were willing to entertain more litigation.") (emphasis added).

64. *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1814 (2005) (internal quotations marks omitted).

conditions, there is an obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of 'rule of decision' procedural bars at issue in *Artuz*, which go to the ability to obtain relief."⁶⁵ The Court's draconian position, that all timeliness rules are conditions to filing, leaves no room for state law determinations to the contrary, suggesting that "properly filed" is a matter of federal law. Though the dissenters disagreed with the Court on whether an untimely application for state collateral relief could toll the federal limitations period, they seemed to agree that the issue was governed by federal law. The dissenters argued that "[a] time bar is nothing more than a species of the larger category of procedural bars that may preclude consideration of the merits of the state petition."⁶⁶ Although Justice Stevens implicitly acknowledged that some states have timeliness rules that do not function like the procedural bars at issue in *Artuz*,⁶⁷ his proposed rule would not have allowed those states to declare that untimely petitions do not toll the limitations period. The consensus seems to be that, although proper filing will be determined with reference to state law governing filings, it is ultimately a matter of federal law. Specifically, timeliness is governed by state law, but proper filing is governed by federal law.

The Supreme Court provided the district courts with an unequivocal rule on the issue of timeliness. But it left them with little guidance for resolving criteria for determining what procedural rules can prevent applications for state collateral relief from being properly filed. In *Artuz*, the Court held that a state court application containing procedurally barred claims was properly filed so as to toll the federal habeas statute of limitations in part because to hold otherwise would "require judges to engage in verbal gymnastics when an application contains some claims that are procedurally barred and some that are not."⁶⁸ Justice Scalia wrote, for a unanimous Court, that a district court should not have to say that an application is properly filed *as to* nonbarred claims and not properly filed *as to* the

65. *Id.*

66. *Id.* at 1819 (Stevens, J., dissenting).

67. *See id.* ("most state laws respecting untimely filings of postconviction petitions function in a manner identical to the procedural bar at issue in *Artuz*").

68. *Artuz v. Bennett*, 531 U.S. 4, 10 (2000).

rest because AEDPA refers only to properly filed *applications* and does not contain the “peculiar suggestion” that a single application can be both properly filed and not properly filed.⁶⁹ In *Pace*, the Court appeared to have turned this analysis on its head, despite its rhetoric to the contrary. The *Pace* Court held that whether an application was properly filed in a state court could be determined by a claim-by-claim inquiry into the timeliness of the application.⁷⁰ It follows logically that the Court’s holding in *Pace* would permit a district court to say that an application is properly filed as to claims not time-barred and not properly filed as to time-barred claims, leading to the “peculiar” result—that of a single application being at one time properly filed and not properly filed—that *Artuz* expressly intended to avoid.⁷¹

The inconsistency between *Artuz* and *Pace* is further demonstrated by the Court’s policy analysis. The *Pace* Court expressed the concern that if a state petitioner could toll the statute of limitations at will simply by filing untimely state postconviction petitions, this would turn the tolling provision into a de facto extension mechanism contrary to AEDPA’s purpose and open the door to abusive delay.⁷² Yet *Artuz* permits a state petitioner to toll the federal habeas statute of limitations at will simply by filing state postconviction petitions containing procedurally barred claims.⁷³ The ease with which the Court turned on its reasoning in *Artuz* suggests that the law governing tolling of the federal limitations period will not develop in a consistent and predictable manner.⁷⁴

B. Reasonable Confusion

The *Pace* majority understandably desired one rule to govern the effect of untimely petitions for state collateral review on the federal deadline. Many states provide exceptions to their post-

69. *Id.*

70. See *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1813 (2005).

71. See *id.* at 1818 (Stevens, J., dissenting).

72. See *id.* at 1812 (majority opinion).

73. Admittedly, *Pace* attenuates this policy concern with respect to *Artuz*, for a petitioner could toll the federal habeas statute of limitations at will by filing state applications containing procedurally barred claims, but eventually her applications would be barred by any applicable state filing deadline, at which point the petitioner would no longer be able to toll abusively the federal limitation period.

74. See also *infra* note 94 for another example of inconsistent reasoning regarding the application of AEDPA’s tolling provision.

conviction statutes of limitation that apply to individual claims.⁷⁵ A federal habeas procedure that lumps timeliness rules having exceptions with those that do not is simple and easy to administer. The Court's holding, however, is unfair on its face. Under *Pace*, a petitioner could run the federal limitations period while the state judge is considering the timeliness of the application, and would not know that the federal deadline has passed until after the judge had declared the application untimely.⁷⁶ To remedy this concern, the *Pace* Court held that "[a] petitioner's reasonable confusion about whether an application for state collateral review is timely will ordinarily constitute 'good cause' for [her] to file in federal court" for a stay and abeyance of federal habeas proceedings until state remedies are exhausted.⁷⁷ If a petitioner has established good cause and there is no indication that the petitioner engaged in intentionally dilatory tactics, then a stay of federal habeas proceedings should be granted.⁷⁸ The stay should be conditioned upon the petitioner's pursuing state court remedies thirty days after the stay is entered and returning to federal court within thirty days after state court exhaustion is completed.⁷⁹ The stay is meant to honor the intent behind the original enactment of the tolling provision by protecting a petitioner from the expiration of the federal deadline while she is trying to exhaust state remedies.

The Court did not elaborate on what constitutes reasonable confusion or good cause for the purposes of obtaining a stay and abeyance. At a minimum, reasonable confusion and therefore good cause could be established by the mere existence of an exception to the state bar against untimely petitions. In this situation, a federal stay and abeyance would be granted if a petitioner chooses to file an untimely state petition, hoping that she will obtain review of her claims on the merits by way of an exception to the time bar. The federal courts are unlikely to take this approach to good cause. Many states have exceptions to their bars to untimely petitions.⁸⁰ Under this expansive ap-

75. *Pace*, 125 S. Ct. at 1818 (Stevens, J., dissenting).

76. *See id.* at 1813 (majority opinion).

77. *Id.*

78. *See id.* at 1814 (citing *Rhines v. Weber*, 125 S. Ct. 1528, 1535 (2005)).

79. *See Rhines*, 125 S. Ct. at 1535.

80. *See Pace*, 125 S. Ct. at 1818 (Stevens, J., dissenting).

proach, a petitioner who is nearing the end of the one-year federal limitations period and who knows to a certainty that her potentially meritorious claims cannot fall under an exception to a state time bar could nevertheless obtain, at a minimum, a sixty-day extension on the federal deadline, thereby frustrating the purpose of AEDPA's statute of limitations. Even though such an application for a stay and abeyance would likely be denied based on the petitioner's dilatory tactics,⁸¹ the possibility that the petitioner's plan could succeed makes it likely that determinations of reasonable confusion and therefore good cause will involve some degree of judicial analysis of the claims as they apply to the state timeliness rules.

At a maximum, reasonable confusion and therefore good cause could be established upon a finding, by the district court judge applying the state law on exceptions to untimely applications, that the petitioner's application for state collateral relief is timely. In this scenario, the judge would then grant a stay and abeyance and allow the petitioner to proceed to state court. Similarly, if the judge, applying the state timeliness rules, finds that the petitioner's claims do not fit the state timeliness exceptions, then she would deny the stay and abeyance. I will term this approach the "do-it-yourself" approach.

Case law indicates that the do-it-yourself approach might be adopted by the federal courts. In *Carey v. Saffold*,⁸² the Supreme Court ordered the Ninth Circuit Court of Appeals to apply a complicated California timeliness law to determine whether a petitioner's previously filed and denied application to a state court was a "pending" application for collateral relief as the term is used in AEDPA's statute of limitations provision.⁸³ Because the law was complicated, the Court permitted the Court of Appeals to certify a question to the California Supreme Court for a clarification of its law on timeliness.⁸⁴ In *Saffold*, therefore, the Court promulgated a do-it-yourself approach whereby the federal court would apply the state law for the purposes of determining whether a petition for state collateral relief was pending under AEDPA. In *Rhines v. Weber*,⁸⁵ the Supreme Court held that the district court could grant a stay and

81. *See id.* at 1814 (majority opinion).

82. 536 U.S. 214 (2002).

83. *Id.* at 225–27.

84. *Id.* at 226–27.

85. 125 S. Ct. 1528 (2005).

abeyance of a federal habeas petition containing both exhausted and nonexhausted claims if the petitioner had good cause for her failure to first exhaust state court claims.⁸⁶ The approach in *Rhines* is in accordance with the do-it-yourself standard. The district court judge is asked to determine, by applying her own sound judgment and, of course, precedent, whether a petitioner had good cause for her failure to exhaust in state court.

The do-it-yourself approach is an inappropriate method of determining reasonable confusion and therefore good cause. First, one could reasonably argue that, because proper filing is governed by federal law, a federal judge's determination that a state application is timely under state law means that the application tolls the federal deadline and a protective stay is unnecessary. Second, the do-it-yourself approach fails to give adequate weight to the inherently uncertain nature of judging. A federal judge could apply a state timeliness rule and find that a petitioner's application is untimely, while a state court judge, applying the same law to an identical case, could find the application timely. The more complicated the state timeliness law, the higher the likelihood that this discrepancy will occur. If a petitioner is denied a federal stay based on a district judge's incorrect determination that the application is untimely under state law, but the court does not dismiss the application on the merits and the state court ultimately determines that the petition is timely, it seems that the petitioner's application would toll the federal deadline and she would later be able to proceed to federal court as if she had never been before, making the previous encounter a waste of time and resources for all parties involved. Third, in cases where the state timeliness law is complicated or unclear, the district court may need to certify a question to the state supreme court. Federal habeas proceedings do not toll the limitations period.⁸⁷ It would be painfully unfair for the federal habeas limitations period to run while the state court responds to the district court's certification. Fourth, the do-it-yourself method frustrates principles of comity and federalism because it allows federal judges to make prelimi-

86. *Id.* at 1535.

87. See *Duncan v. Walker*, 533 U.S. 167, 181–82 (2001).

nary rulings on timeliness questions that should be first addressed by state courts.

A better approach is for a judge to find reasonable confusion and therefore good cause when the timeliness of the application for state collateral relief is less than clear and any reasonable jurist could find the petitioner's application timely under state law. This approach best serves the statute of limitations and the exhaustion requirement. It avoids the delay and waste of resources associated with sending to state courts applications that cannot possibly be accepted under state law. It also recognizes the variations and uncertainties that are associated with judging, and gives the states the first opportunity to address the timeliness of applications for collateral relief. Finally, a procedure that does not require judges to make precise applications of state timeliness rules is easy to administer. Requiring district court judges to apply the state law could become unduly burdensome if the *Pace* ruling results in copious protective filings.

C. Finality of State Judgments

The *Pace* opinion is likely to be heavily critiqued. Most federal habeas petitioners file pro se.⁸⁸ Capital federal habeas petitioners have a statutory right to counsel⁸⁹ but noncapital petitioners, who constitute the bulk of federal habeas petitioners,⁹⁰ are appointed counsel in only rare circumstances.⁹¹ Un-

88. RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1298 (5th ed. 2003).

89. 102 Stat. 4393 (codified as amended at 21 U.S.C. § 848(q)(4)(B)). Habeas petitioners generally do not, however, have a constitutional right to effective counsel during federal or state collateral proceedings. See, e.g., *Pennsylvania v. Finley*, 481 U.S. 551, 554–55 (1987); *Johnson v. Avery*, 393 U.S. 483, 488 (1969). Habeas scholarship is replete with calls for mandatory appointment of effective counsel, especially for death penalty petitioners. See, e.g., Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. PITT. L. REV. 521 (2005); Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31 (2003); Andrew Hammel, *Effective Performance Guarantees for Capital State Postconviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347 (2003); Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467 (2000).

90. In 2000, capital petitions constituted only 259 of the 21,345 federal habeas petitions by state defendants. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 3 tbl.2 (2002).

represented and poorly educated petitioners will make protective filings because they will not be able to predict accurately the timeliness of their applications,⁹² and some will mistakenly make protective filings in federal court when their state application is plainly timely or untimely. Therefore, the Court's protective filing requirement makes the federal courts vulnerable to a "flood" of such filings,⁹³ particularly where state timeliness rules are complicated or unclear. Given the possibility of these burdensome results, one could reasonably argue that the Court has failed to apply AEDPA's statute of limitations and tolling provision sensibly.⁹⁴

91. A federal court must appoint counsel for an indigent petitioner if an evidentiary hearing is required, *see* R.8(c), Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. app. (2000) (effective Feb. 1, 1977, Act of Sept. 28, 1976, Pub. L. No. 94-426, § 1, 90 Stat. 1334, and as amended thereafter), or when necessary to utilize effectively discovery authorized by the court, *see* R. 6(a).

92. *See* Pace v. DiGuglielmo, 125 S. Ct. 1807, 1821 (2005) (Stevens, J., dissenting).

93. *See id.* at 1820–21.

94. The *Pace* procedure is also awkward; whether an application filed with the court clerk has tolled the federal deadline depends on events that will occur in the future. In other words, AEDPA's tolling provision is applied retroactively. A petitioner should be able to determine that her application has tolled the federal deadline once the court clerk accepts the application for review of its claims. Interestingly, four of the Justices in the majority (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) had previously expressed dissatisfaction with retroactive application of AEDPA's tolling provision. In *Carey v. Saffold*, 536 U.S. 214 (2002), all four Justices expressed disapproval of a procedure that left uncertain the tolling effect of a previously filed state application for collateral relief. *See id.* at 234–35 (Kennedy, J., dissenting). In *Saffold*, the Court held that an application for postconviction or other collateral review is "pending," as the term is used in AEDPA's tolling provision, during the interval between a state lower court's determination and the further filing of either an appeal or an original state habeas petition to a higher court, but only if the further filing is timely. *See id.* at 217, 225–27. Under *Saffold*, a petitioner will not know whether her application for state collateral relief was pending so as to toll the federal limitations period from the date of the last judgment on state collateral review until the state court ruled on the timeliness of the latest application. In other words, an application for state collateral review retroactively becomes pending after the state court has ruled on the timeliness of the latest application. Justice Kennedy dissented, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, stating that

This [was] not a sensible way of determining when an application is 'pending' under the federal tolling provision. Whether an application is pending at any given moment should be susceptible of a yes or no answer. On the Court's theory, the answer will often be 'impossible to tell,' because it depends not on whether an application is under submission in a particular court but upon events that may occur at some later time.

Id. at 234–35 (Kennedy, J., dissenting). A similar argument could easily be made in Pace's favor. He should be able to determine at any given moment whether his

A brief look at the options the Court forwent in settling with the *Pace* stay and abeyance procedure yields insight into the Court's motive for adopting such a cumbersome procedure. The *Pace* opinion outlined, among others, two issues: whether an untimely application tolls the federal deadline, and whether a petitioner should be required to make a protective filing in federal court. The Court held that an untimely petition does not toll the federal deadline and a petitioner must make a protective filing to preserve the opportunity for federal review if she is uncertain about whether her state application for collateral relief is timely.⁹⁵ It also held that the district court should dismiss a petition, without granting a stay, if the claims presented are meritless.⁹⁶ A petitioner whose application is dismissed on its merits would be able to return to federal court under very limited circumstances.⁹⁷ *Pace* permits the federal courts to "peek" at the merits of a petitioner's application before state remedies have been exhausted. It encourages early conclusion of federal review of meritless petitions, and therefore promotes the finality of state judgments. From this perspective, the inefficiencies of the *Pace* procedure become favorable; petitioners who mistakenly make protective filings in federal court will face early dismissal of their applications if the claims within them are meritless.

application was properly filed under the federal tolling provision. It is not sensible for events that may occur in the future to be the basis for whether an application already under submission in a court is properly filed. The four Justices' departure from their position in *Saffold* is likely to be a point of criticism; the Court will likely be chastised for failure to apply AEDPA's tolling provision sensibly. The four votes can be seen, however, as an acceptance of retroactive application as an established characteristic of AEDPA's tolling provision. Strictly on the point of retroactivity, *Pace* does no damage that *Saffold* has not already done.

95. See *Pace*, 125 S. Ct. at 1813–14.

96. See *Rhines v. Weber*, 125 S. Ct. 1528, 1535 (2005). See also WRIGHT ET AL., *supra* note 34, § 4261 ("[P]risoners thrive on [federal habeas corpus] as a form of occupational therapy and for a few it serves as a means of redressing constitutional violations The great bulk of [federal habeas] applications are meritless.").

97. To appeal a denial of relief by a district judge, a petitioner must obtain from either the district court where he was denied relief or the court of appeals a "certificate of appealability," which issues upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)–(2) (2000). The certificate of appealability must indicate the specific issues showing the denial of the right. *Id.* § 2253(c)(3). Second or successive petitions for federal habeas relief by state prisoners are governed by 28 U.S.C. § 2244(b) (2000) and can be filed only under very limited circumstances.

Assuming that the process of issuing a federal protective stay is not so time-consuming as to exacerbate the problem of delay, other options, though they may be more fair or less cumbersome, might not be as effective at promoting the finality of state judgments. The dissenters took the position that an untimely petition should toll the federal deadline if the petitioner did not file for state postconviction relief “explicitly to prolong the federal statute of limitations,” and that a protective filing was not necessary.⁹⁸ An alternative option would be to require a petitioner to file for a stay because an untimely petition does not toll the federal deadline, but that the stay is to be issued if the petitioner did not file for state postconviction relief explicitly to prolong the federal statute of limitations. Yet another option is one in which petitioners are not required to make a protective filing, but are granted tolling after leaving the state court if there was reasonable confusion about the timeliness of the state application. None of these three options would be as effective at promoting the finality of state judgments as the procedure adopted by the Court. A petitioner can more easily obtain tolling or a stay if evidence against her must be “explicit.” And a scheme that does not require petitioners to make a protective filing does not allow district courts to peek at petitions and dismiss the meritless ones early.

Another scheme would be to require petitioners to file for a stay because an untimely petition does not toll the federal deadline, but the stay and its sixty-day grace period would be invalidated by the tolling provision if the state court ultimately determines that the petition is timely. The principle behind this scheme is that a timely petition that otherwise complies with state law governing filings activates AEDPA’s tolling provision and “that is the end of the matter for the purposes of [the tolling provision].”⁹⁹ Under this option, petitioners who meet the requirements for obtaining a stay would receive one, but only those whose state petitions are held to be untimely would ultimately use it. This option would be less effective at promoting the finality of state judgments in cases where activation of the tolling provision gave the petitioner longer than thirty days to

98. *Pace*, 125 S. Ct. at 1820–21 (Stevens, J., dissenting).

99. *See Pace*, 125 S. Ct. at 1812 (holding that when a postconviction petition is untimely under state law, that is the end of the matter for the purposes of AEDPA’s tolling provision).

return to federal court. The thirty-day return was specifically designed to prevent capital petitioners from using the stay and abeyance procedure to prolong incarceration and avoid execution.¹⁰⁰ The procedure adopted by the Court allows the district court to rid the federal system of meritless petitions at an earlier time and to usher more quickly federal habeas petitioners through the system.

V. CONCLUSION

AEDPA's statute of limitations is designed to curb the delay that has plagued the federal habeas system. Because only capital prisoners have real incentive to delay, *Pace* is likely to have an effect on delay only in collateral attacks on death penalty judgments. *Pace*, however, furthers the interests of finalizing state judgments, one of the established goals of AEDPA's statute of limitations,¹⁰¹ regardless of the nature of the case. Restricting access to federal habeas review of state judgments in the interests of the finality is an attack on the procedure at its core. Federal habeas by its very nature unsettles state judgments. Proponents of limited federal review of state judgments argue that state judges are as equally bound and competent to uphold the constitutional rights of defendants as federal judges. As Professor Bator so aptly put it, "if a job can be well done once, it should not be done twice."¹⁰² Others see AEDPA as a means of eliminating a vital avenue for the vindication of constitutional rights. In *Sanders v. United States*,¹⁰³ Justice Brennan declared that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."¹⁰⁴ The latter camp values federal habeas particularly in capital cases where correction of constitutional errors made in the state courts is literally a matter of life and death and where federal habeas has proven to be a vital means of correcting those errors.¹⁰⁵ Al-

100. See *Rhines*, 125 S. Ct. at 1535.

101. See *supra* Part IV.C.

102. Paul M. Bator, *Finality in Criminal Law and the Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963). See Professor Bator's article for a discussion of the role of finality in the criminal justice system.

103. 373 U.S. 1 (1963).

104. *Id.* at 8.

105. Studies reveal that between 1973 and 1995, federal habeas courts overturned forty percent of the state death penalty sentences they reviewed

though the *Pace* system promises to promote the finality of state judgments, it will exacerbate the problem it attempts to alleviate if the stay and abeyance procedure is too time-consuming and burdensome. A burdensome stay and abeyance procedure also compromises AEDPA's goal to streamline federal habeas proceedings.¹⁰⁶ In any case, the message to all petitioners who seek federal habeas review of a state judgment is clear: File early!

N. Noelle Francis

because of prejudicial or reversible error. See JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995* (2000).

106. See *Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1820–21 (Stevens, J., dissenting) (expressing the concern that the Court's holding in *Pace* was unfaithful to AEDPA's goal of streamlining the federal habeas system); cf. *Duncan v. Walker*, 533 U.S. 167, 180 (2001) (stating that the exhaustion requirement was designed to reduce piecemeal litigation).