

No. 03-9803

**IN THE
SUPREME COURT OF THE UNITED STATES**

ROBERT T. WHITED, Jr.,

Petitioner,

v.

WARDEN, LAWRENCEVILLE CORRECTIONAL CENTER,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the filing of a petition for a writ of certiorari, from a state court's denial of collateral relief, constitute an "application for state post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), such that the statute of limitations for federal habeas petitions is tolled while that petition is pending?

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Respondent, the Warden of the Lawrenceville Correctional Center of the Virginia Department of Corrections (“Warden”), through his counsel, Virginia Attorney General Jerry W. Kilgore, and pursuant to this Court’s Orders of May 13, 2004, directing that a response be filed, and June 8, 2004, extending the time for such filing, hereby responds to the Petition for Writ of Certiorari. For the reasons set forth below, the petition should be denied.

STATEMENT OF THE CASE

The petition presents an issue of statutory construction: whether the statute of limitations on *federal* habeas corpus applications, provided by 28 U.S.C. § 2244(d)(1), is tolled pursuant to § 2244(d)(2) while an inmate petitions this Court for certiorari after the conclusion of *state* habeas proceedings. On this issue the Sixth Circuit has recently created a split in the Circuits. Compare *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003) (en banc) (6-5)(holding that the statute of limitations is tolled), *cert. denied*, 124 S. Ct. 2388 (2004) with *Miller v. Dragovich*, 311 F.3d 574, 580-81 (3rd Cir. 2002), *cert. denied*, 124 S. Ct. 164 (2003); *Crawley v. Catoe*, 257 F.3d 395, 399 (4th Cir. 2001), *cert. denied sub nom.*, *Crawley v. Maynard*, 534 U.S. 1080 (2002); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999) (all holding that the statute of limitations is not tolled). This particular petition, however, is fundamentally flawed and this case provides a poor vehicle for resolution of the question. Accordingly, the petition should be denied.

The background for this petition is relatively straightforward. On March 23, 1999, the Petitioner, Robert T. Whited, Jr., pled guilty to two counts of grand larceny, one count of concealment and one count of attempted grand larceny.¹ As a result, on April 26, 1999, Whited

¹ Whited originally was charged with eight felonies. He entered into a plea agreement that resulted in some of the charges being amended. The remaining four indictments were dismissed on the Commonwealth’s motion. There was no appeal.

received a twenty year suspended sentence and was placed on probation under several conditions.²

The conditions on Whited's probation included, *inter alia*, completion of a residential drug treatment program and requirements that, afterwards, he not use illegal drugs, maintain regular employment, follow the direction of his probation officer, report when and as instructed, and not change his residence or live outside of Virginia without permission. Resp. App. 1. After completing the residential drug program on August 20, 1999, Whited received permission to live in North Carolina. Resp. App. at 1. On October 4, 1999, when he had not heard from Whited since August 20, Whited's probation officer contacted an address of record in West Virginia and discovered that Whited was living there, rather than in North Carolina. *Id.* On November 3, after various efforts to bring Whited into compliance with the conditions of his probation, Whited's probation officer requested approval of a probation violation hearing. *Id.* As a result, the Circuit Court of Tazewell County, on November 10, 1999, issued a Capias to Show Cause, ordering Whited's arrest.

In January of 2000, the State of West Virginia arrested Whited and, upon discovering the outstanding Capias, held him in custody. In February, the Tazewell County Commonwealth's Attorney, Dennis H. Lee, signed a request for Whited's return to Virginia. Resp. App. 5-6. In July, before the pending West Virginia charges were resolved, Whited was transferred to the Tazewell County jail. At that time, his probation officer requested that a probation violation

² Pursuant to U.S.S.Ct. R. 15.2, facts surrounding the conditions placed on Whited's probation and the revocation of his suspended sentence are included in Respondent's Statement of the Case in order to correct inaccurate factual representations made by the petition. A supplemental appendix has been provided (Resp. App.) and contains materials from the record which establish the corrected facts.

hearing be scheduled on violations of five of the eleven conditions placed on his probation.³ *Id.* at 7-9.

After Whited's appointed counsel was notified of the date of his revocation hearing, Whited pled guilty to violating the conditions of his probation.⁴ The circuit court found Whited guilty and revoked his probation, imposing the previously suspended 20-year sentence. Resp. App. 12-14. There was no appeal. However, subsequently retained counsel sought reconsideration of the sentence imposed. Resp. App. 16.

On August 29, 2001, Whited, by counsel, filed a petition for a writ of habeas corpus in the Tazewell County Circuit Court. Whited's state habeas petition raised two claims concerning the probation revocation proceeding. First, he alleged conflict of interest, claiming that his prior defense attorney was *the* Commonwealth's Attorney for Tazewell County and that he had "full knowledge" of "confidential information when he chose to initiate Mr. Whited's extradition from West Virginia and to prosecute him on a probation violation," which allegedly violated the attorney-client relationship and denied Whited due process. Resp. App. 24, 22-27. Second, his state habeas petition alleged that Whited was denied effective assistance of counsel because his

³ Whited's reported probation violations included i) failure to work; ii) failure to follow direction of probation officer by not reporting as directed and failure to appear for scheduled job interviews; iii) use of illegal drugs (two positive drug screens while on probation and an admission of use to his probation officer); iv) failure to maintain his residence in North Carolina or Tazewell County as directed by his probation officer; and v) failure to obey all state and federal laws (as a result of his arrest in West Virginia). Resp. App. at 7-9, 10.

⁴ Upon motion of the Commonwealth, the Circuit Court disqualified the Commonwealth's Attorney's Office from prosecuting the revocation, and appointed an acting prosecutor, because Whited's former defense attorney had become an Assistant Commonwealth's Attorney in January of 2000. Resp. App. at 11

attorney for the probation revocation proceeding failed to conduct an independent investigation. Resp. App. 20, 27-31.

On October 12, 2001, the state circuit court dismissed both of Whited's habeas claims: the due process claim pursuant to *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974) (habeas corpus cannot be used as a substitute for trial and appeal)⁵; and the ineffective assistance claim pursuant to *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (no right to counsel for probation revocation proceeding). Resp. App. 34-35. The court denied Whited's motion for reconsideration on October 30, 2001. Whited filed a petition for appeal of the circuit court's decision in the Virginia Supreme Court. It was denied on April 12, 2002, as was his petition for rehearing to that court, on June 7, 2002. Resp. App. 36, 37. Whited then filed a petition for writ of certiorari, seeking this Court's review of the state court's denial of his state habeas petition. That petition was denied on October 21, 2002. *Whited v. Virginia*, 537 U.S. 981 (2002).

On October 31, 2002, Whited filed an application for writ of habeas corpus in the United States District Court for the Western District of Virginia.⁶ The application alleged that: (1) Whited was denied his Sixth Amendment right to counsel because the attorney who represented him in the probation revocation proceeding was ineffective; and (2) the "Commonwealth Attorney's Office" had a conflict of interest because the attorney who represented Whited on the

⁵ This Court has previously recognized a finding that a claim defaulted under *Slayton* precludes subsequent federal habeas review of that claim, absent cause and prejudice to excuse the default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986) ("Under Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding").

⁶ Whited's counsel filed an essentially identical petition on or about October 22, 2002, raising the same claims, but erroneously invoking 28 U.S.C. § 2255 as the basis for relief.

underlying criminal charge “joined the Commonwealth Attorney’s Office of Tazewell County.”⁷
Pet. App. C.

The Commonwealth moved to dismiss the federal habeas application on the basis that it was barred by the statute of limitations contained in 28 U.S.C. § 2244(d)(1). Resp. App. 41-44. The Commonwealth also noted that the conflict of interest claim was defaulted because it was not the same claim raised in the state proceedings. *See Bassette v. Thompson*, 915 F.2d 932, 936-37 (4th Cir. 1990). The district court, relying on the Fourth Circuit’s decision in *Crawley*, dismissed Whited’s petition on September 17, 2003 as untimely filed.⁸ Pet. App. B. Whited appealed that decision to the Fourth Circuit, which refused to issue a Certificate of Appealability. Pet. App. A. This petition for certiorari followed.

⁷ This claim is factually distinct from the claim advanced in the state petition. To explain, the claim raised in the state petition alleged that Mr. McIntock was the Commonwealth’s Attorney who chose to initiate Mr. Whited’s extradition from West Virginia and to prosecute him on a probation violation, which allegedly violated the attorney-client relationship and denied the petitioner due process. Resp. App. 23. In contrast, the claim advanced in the federal petition alleged only that previous defense counsel, merely by becoming a member of the local prosecutor’s office, created an impermissible conflict of interest. *See Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) (citing *Mehtensimer v. Wilson*, 431 S.E.2d 301, 302 (Va. 1993)).

⁸ Whited failed to address the Fourth Circuit’s decision in *Crawley v. Catoe*, despite the facts that i) *Catoe* was decided *prior* to Whited’s filing of his state habeas petition; ii) it clearly rendered his federal habeas petition time-barred, and iii) an order from the district court directed him to address the issue of the timeliness of his federal petition.

REASONS FOR DENYING THE WRIT

The question presented by the petition is whether or not the statute of limitations on federal habeas corpus applications, provided by 28 U.S.C. § 2244(d)(1), is tolled pursuant to § 2244(d)(2) while an inmate petitions this Court for certiorari after the conclusion of state habeas proceedings. However, this is not the right case in which to resolve the question. This is so for four reasons. First, the Fourth Circuit was not given the opportunity to consider the Sixth Circuit's decision in *Abela* and, therefore, the decision appealed from provides no analysis of the question. Second, because petitioner's claims, as a matter of law, have no merit, there is an alternative ground to affirm. Third, the petition misrepresents the split in the Circuits. Fourth, this Court's decisions dictate the result reached by the Fourth Circuit.

I. THE SIXTH CIRCUIT'S OPINION IN *ABELA* WAS NEITHER RAISED NOR DISCUSSED BELOW.

Although the Sixth Circuit decided *Abela* more than two months before this case was submitted for decision in the Fourth Circuit, petitioner failed to bring the decision to the Fourth Circuit's attention. Because the timeliness of petitioner's federal habeas petition was so plainly controlled by *Crawley*, the Fourth Circuit issued a one page opinion, devoid of substantive analysis, dismissing Petitioner's federal habeas application. Even after the Fourth Circuit issued its decision, petitioner did not ask the full court to rehear the case en banc to reconsider its precedent in light of *Abela*.⁹

⁹ A panel in the Fourth Circuit cannot overrule a prior panel and is "bound to apply principles decided by prior decisions of the court to the questions" addressed by the panel. *See Under Seal v. Under Seal*, 326 F.3d 479, 484 (4th Cir. 2003); *see also Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (1993) (panel decision binding until reversed *en banc* or a superceding contrary decision of the Supreme Court).

Petitioner's failure to raise *Abela* below has significant consequences. Had petitioner argued for adoption of the reasoning in *Abela*, the Fourth Circuit likely would have engaged in a substantive discussion of the case. Conceivably, the Fourth Circuit might have decided to consider overruling *Crawley*. In any event, substantive discussion of the question by that court would have provided some assistance to this Court regarding the resolution of the question presented by the petition. If this Court is going to resolve this split in the Circuits, it should do so in a case where the lower court has explicitly considered and either reconciled, accepted, or rejected the Sixth Circuit's reasoning. This Court should not resolve the split in a case where the lower court never engaged in a substantive analysis of the various positions, or where there is a clear alternative ground to affirm.

II. BECAUSE PETITIONER'S CLAIMS, AS A MATTER OF LAW, HAVE NO MERIT, THERE IS AN ALTERNATIVE GROUND UPON WHICH TO AFFIRM.

If the Fourth Circuit had not applied the statute of limitations to dismiss the federal habeas petition, it would have reached the same result on the merits. Quite simply, as a matter of law, petitioner's federal habeas claims have no merit. The conflict of interest claim asserted in petitioner's federal habeas petition is, factually, not the same claim as the one he raised in his state habeas proceeding. On state habeas, he argued that his former counsel was *the* Commonwealth's Attorney, and that his former counsel decided to extradite him.¹⁰ Resp.

¹⁰ The claim alleged by his state habeas petition was plainly false, as clearly established by the record. The request for the revocation was made by the probation officer; the capias was issued several months before petitioner's former counsel joined the prosecutor's office as an *assistant*, and the only involvement of the Commonwealth's Attorney while petitioner's former counsel worked in his office was the signing of the extradition request by the Commonwealth's Attorney himself. Nonetheless, Whited never moved to amend his state petition.

App. 19. The circuit court dismissed the claim as defaulted under *Slayton*, and that ruling was affirmed on appeal by the Supreme Court of Virginia's refusal of the petition for appeal.

Petitioner's federal habeas petition did not claim that his former attorney was the Commonwealth's Attorney who decided to extradite him and revoke his probation, but instead argued that an impermissible conflict of interest existed as a result of the mere appointment of his former counsel to serve as an *assistant* in the Commonwealth's Attorney's office approximately two weeks prior to the issuance of the extradition request.¹¹ The allegations of the federal habeas petition did not even state a colorable claim. Where a petitioner brings a claim in federal habeas that was not raised in the state court habeas proceeding, and he can no longer raise the new claim in state court, the claim is simultaneously exhausted and defaulted for purposes of federal habeas review. *See, Bassett*, 915 F.2d at 936-37.

Petitioner's ineffective assistance of counsel claim must fail as a matter of law because this case does not fall into the narrow category of probation revocation proceedings that this Court has indicated might require assistance of counsel. *See Gagnon*, 411 U.S. at 791 (due

¹¹ In order to establish a constitutional violation in the context of a prosecutor's involvement in the prosecution of a defendant whom he had previously represented, the defendant must show that confidential information was disclosed, and that the prosecutor did something more than a ministerial task in the proceeding. *See Havens v. Indiana*, 793 F.2d 143, 145-46 (7th Cir. 1986); *see also Adams v. State*, 575 N.E.2d 625, 629-30 (Ind. 1991) (where attorney's participation as defense counsel and later as prosecutor in the same matter was minimal and defendant has shown no prejudice, defendant is not entitled to relief); *State v. Cline*, 405 A.2d 1192, 1206 (R.I. 1979) (essential question in context of prosecutor's involvement in prosecution of former client is whether defendant has been prejudiced, prejudice being disclosure of confidential information). Petitioner had the burden in state habeas to establish his claim by a preponderance of the evidence, and he failed. *See Curo v. Becker*, 493 S.E.2d 368, 369 (Va. 1997).

process does not require that counsel be provided in every probation revocation proceeding).¹² Petitioner did not make a timely and colorable claim that he did not commit the violations and he did not offer substantial reasons for his violations that made revocation inappropriate. Thus, there is simply no merit to any claim raised in the federal habeas petition.

In sum, petitioner has been less than candid as to the reviewability of his alleged claims. His presentation of the facts in his petition for certiorari is, similarly and at best, inaccurate. An attempt to resolve this issue upon the distorted record petitioner presents to the Court in this case would be an exercise in confusion and constant clarification. This Court should await a stronger presentation of the issue for resolving the question and a case where the merits of the habeas claim do not so clearly offer an alternative ground for affirmance.¹³

¹² *Gagnon* noted that as a prerequisite to a requirement that counsel be made available in a revocation hearing, a defendant had to make “a timely and colorable claim that (i) he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, *and* that the reasons are complex or otherwise difficult to develop or present.” 411 U.S. at 791 (emphasis added). *See also Alabama v. Shelton*, 535 U.S. 654, 664 (2002) (reaffirming that *Gagnon* distinguished the right of a defendant in a criminal proceeding from the “the more limited due process right of one who is a probationer or parolee”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 (1996) (“For probation-revocation hearings where loss of conditional liberty is at issue . . . our precedent is not doctrinaire; due process is provided, we have held, when the decision whether counsel should be appointed is made on a case-by-case basis.”) (citing *Gagnon*, 411 U.S. at 790). As noted herein, any claim of innocence advanced by Whited is not a colorable claim in light of the record and the reasons for violations subsequently offered are neither complex nor difficult to present.

¹³ Other circuits have declined to rule on the present issue. The Second, Fifth, Seventh, Eighth and Eleventh Circuits have all held that the limitations period is not tolled in cases where a state prisoner has not filed a petition for certiorari for review of the denial of state post-conviction relief. *See Smaldone v. Senkowski*, 273 F.3d 133, 136-37 (2^d Cir.), *cert. denied*, 535 U.S. 1017 (2002); *Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir.), *cert. denied*, 532 U.S. 998 (2001); *Gutierrez v. Schomig*, 233 F.3d 490, 491-92 (7th Cir. 2000); *Coates v. Byrd*, 211 F.3d 1225, 1227(11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999). Therefore, it is likely that the question presented here will come to this Court with a substantive opinion below that forms a suitable basis for resolution of the question.

III. THE PETITION MISCHARACTERIZES THE SPLIT IN THE CIRCUITS.

As noted above, the Third, Fourth and Tenth Circuits have held that the federal habeas statute of limitations set forth in 28 U.S.C. § 2244(d)(1) is not tolled pursuant to § 2244(d)(2) while a petitioner pursues a writ of certiorari from the denial of state collateral relief in this Court. *See Miller*, 311 F.3d at 580-81; *Crawley*, 257 F.3d at 399; *Rhine*, 182 F.3d at 1156. *See also White v. Klitzkie*, 281 F.3d 920, 926 (9th Cir.), *rehearing en banc denied*, 298 F.3d 885 (9th Cir. 2002) (petition for certiorari to court of appeals under 48 U.S.C. § 1424-2 to review decision of the Supreme Court of Guam is a *federal proceeding* and § 2244(d)(2) does not toll time to file habeas petition). In October of 2003, the Sixth Circuit voted 6-5 to reject that rule and held that the time for filing a federal habeas petition *is* tolled while a petition for writ of certiorari might be filed and, if such petition is filed, while it is pending. *Abela*, 348 F.3d at 170-73.

The petition represents that the Sixth Circuit is not alone in reaching its conclusion in *Abela* and points to the Third Circuit's decision in *Morris v. Horn*, 187 F.3d 333, 337 (3rd Cir. 1999) for support. This is simply wrong. As the Sixth Circuit noted in *Abela*: the Third Circuit has abandoned its position in *Morris* and now holds, like the Fourth and Tenth Circuits, that the federal limitations period is *not* tolled during the time a state prisoner seeks a writ of certiorari in this Court from the result of a state court collateral review. *Abela*, 348 F.3d at 169; *Miller*, 311 F.3d at 579-80.

IV. THE DECISION OF THE FOURTH CIRCUIT WAS CORRECT.

Finally, this petition provides a poor vehicle for resolving the question presented because the Fourth Circuit’s decision is correct. A state prisoner’s right to file a federal habeas petition, in most instances, accrues at the time his *direct* review is concluded and, pursuant to 28 U.S.C § 2244(d)(1), the federal habeas petition must be filed within one year of the conclusion of direct review. *See* 28 U.S.C. § 2244(d)(1)(A).¹⁴ Although direct review ends “when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires,” *Clay v. United States*, 537 U.S. 522, 527 (2003), Congress expressly provided for the tolling of the one-year limitation on federal habeas petitions during the time in which “a properly filed application for *State post-conviction or other collateral review* with respect to the pertinent judgment or claim is pending” 28 U.S.C. § 2244(d)(2) (emphasis added). Congress’ language excludes review of the state process by a federal court. *Crawley*, at 400.

This Court has established what constitutes “State post-conviction or other collateral review” and when such proceedings are pending. That time period does *not* include the time for filing a petition for writ of certiorari in this Court or the time such a petition is pending. *Duncan v. Walker*, 533 U.S. 167, 173 (2001). *See also Ulster Co. Ct. v. Allen*, 442 U.S. 140, 149 n.7 (1979) (seeking certiorari from denial of state collateral review is not part of the exhaustion of

¹⁴ Section 2244(d)(1) also provides that the limitations period shall run from the latest of the following dates: the date on which an impediment to filing an application created by State action is removed, if the applicant was prevented from filing by such State action; 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 the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1)(B)-(D).

state remedies required before seeking federal habeas relief). This Court has determined that the word “State” modifies both the words “post-conviction” and “other collateral review” in the tolling provision.¹⁵ *Duncan*, 533 U.S. at 173. An application for state collateral review is “pending” under the habeas tolling provision until it has “achieved final resolution through the State’s post-conviction procedures.” *Carey v. Saffold*, 536 U.S. 214, 220 (2002). Once the State court has concluded its proceedings, State collateral review is no longer “pending.”

This Court is constituted by virtue of the Constitution, and is not part of any State’s judicial scheme or process. The statutory reference to a “state post-conviction or other collateral review” simply cannot be read to include the opportunity for federal review of the State’s process. The purpose of 28 U.S.C. § 2244 (d) was “to further the principals of comity, finality, and federalism.” *Williams v. Taylor*, 528 U.S. 420, 436 (2000). The rule of the Fourth Circuit, applied below, supports these purposes. The Sixth Circuit’s decision in *Abela* does not. The Sixth Circuit’s decision has yet to be considered by a court in any Circuit. This Court ought not be the first.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be **DENIED**.

¹⁵ In *Duncan*, this Court concluded that Congress, by omitting the word “Federal” in § 2244(d)(2) when it had included the words “State and “Federal” in habeas provisions §§ 2254(i), 2261(e) and 2264(a)(3), demonstrated that “Congress did not intend properly filed applications for federal review to toll the limitations period.”

Respectfully submitted,

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PROOF OF SERVICE

On July 13, 2004 I served one copy of the Brief in Opposition upon all parties required to be served, by United States Postal Service in accordance with Rule 29(3), as follows:

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