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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

WILLIAM ERNEST KUENZEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 1:00-cv-316-IPJ-TMP
	)	
RICHARD F. ALLEN, Commissioner	)	
of the Alabama Department	)	
of Corrections, and the	)	
ATTORNEY GENERAL OF	)	
THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

ORDER FOR BRIEFING

Twice this court has held that the petition for writ of *habeas corpus* by petitioner is time barred under 28 U.S.C. § 2244(d), and twice this court has been reversed by the United States Court of Appeals for the Eleventh Circuit. See Kuenzel v. Campbell, 85 Fed. Appx. 726 (11th Cir., October 15, 2003), and Kuenzel v. Allen, 488 F.3d 1341 (11th Cir., June 13, 2007). On both occasions, the court of appeals based its conclusion that the *habeas* petition was timely filed on the tolling provision of § 2244(d)(2), finding that petitioner's state Rule 32 petition was "properly filed" even though the state court determined that it too was untimely. Citing its own decision in Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003) ("Siebert I"), the court of appeals found that, because the time limitation for filing Rule 32 petitions in Alabama was not jurisdictional, failure to file a Rule 32 petition within the time limit stated at Rule 32.2(c) did not preclude a finding that the petition was nonetheless "properly filed" for purposes of tolling the federal *habeas* time limitation under § 2244(d)(2). In its most recent opinion in this case, the court of appeals rejected this court's

reasoning that the intervening Supreme Court decision in Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005), effectively overruled the decision in Siebert. See Kuenzel v. Allen, 488 F.3d 1341, 1342 (11th Cir. 2007). Citing yet another opinion in the Siebert case, Siebert v. Allen, 480 F.3d 1089, 1090 (11th Cir. 2007) ("Siebert III"), the court of appeals reversed, saying:

> In April 2006, in accordance with 28 U.S.C. § 2253(c), the district court issued a Certificate of Appealability ("COA") specifying the only issue on appeal as whether Pace overruled Siebert I. After briefing and oral argument in this case were concluded, another panel of this Court answered this question in the negative. See Siebert v. Allen, 480 F.3d 1089, 1090 (11th Cir. 2007) ("Siebert III"). The district court therefore erred in dismissing Kuenzel's petition as untimely under AEDPA.

In reversing, the court of appeals remanded the case with the directions that this court address the question of petitioner's "actual innocence" as a way around the assertion that the untimely filing of his state Rule 32 petition constituted a procedural default, as distinct from a § 2244(d) time bar.

On November 5, 2007, the United States Supreme Court reversed the Eleventh Circuit's decision in Siebert v. Allen, 480 F.3d 1089 (11th Cir. 2007) ("Siebert III"), the very case that is the foundation for the court of appeals most recent decision rejecting the § 2244(d) time bar in this case. See Allen v Siebert, 552 U.S. ___, 2007 WL 3238767 (2007). In reversing, the Supreme Court rejected the court of appeals' distinction of jurisdictional time limitations from time limitations as affirmative defenses, saying, "The Court of Appeals' carve-out of time limits that operate as affirmative defenses is inconsistent with our holding in Pace." Id. at *1. Referring to Pace, the Court wrote:

> Although the Pennsylvania statute of limitations at issue in Pace happens to have been a jurisdictional time bar under state law, see Commonwealth v. Banks, 556 Pa. 1, 5-6, 726 A.2d 374, 376 (1999), the jurisdictional nature of the time limit was not the basis for our decision. Rather, we built upon a distinction that we had earlier articulated in Artuz v. Bennett, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000), between postconviction petitions rejected on the basis of "'filing' conditions," which are not "properly filed" under § 2244(d)(2), and those rejected on the basis of "procedural bars [that] go to the ability to obtain relief," which are. Pace, *supra*, at 417, 125 S. Ct. 1807 (citing Artuz, *supra*, at 10-11, 121 S. Ct. 361). We found that statutes of limitations are "filing" conditions because they "go to the very initiation of a petition and a court's ability to consider that petition." Pace, 544 U.S., at 417, 125 S. Ct. 1807. Thus, we held "that time limits, *no matter their form*, are 'filing' conditions," and that a state postconviction petition is therefore not "properly filed" if it was rejected by the state court as untimely. Ibid. (emphasis added).

Allen v Siebert, 552 U.S. ___, 2007 WL 3238767, *1 (2007) (italics in original).

The question arises in the instant case whether this decision by the United States Supreme Court implicates the time bar issue here. The decision in Allen v Siebert seems to undermine the foundation of the court of appeals' last opinion rejecting this court's analysis of Pace, raising the possibility that the law-of-the-case doctrine does not preclude revisiting the time bar issue yet a third time.

Accordingly, it is hereby ORDERED that the Respondents Commissioner and Attorney General may, within twenty (20) days after this Order, file any brief they may wish to offer on the question whether the court should, may, or can revisit the time bar defense in light of the recent Supreme Court decision. Petitioner may respond to the brief filed by Respondents by filing his own brief on this question within twenty (20) days after the date of the certificate of service of the Respondents' brief. Thereafter, within ten (10) days after Petitioner's brief is served, Respondents may file a reply brief.

DONE this 7th day of November, 2007.

T. MICHAEL PUTNAM
U.S. MAGISTRATE JUDGE