No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Mark G. Sands
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) contains a one-year statute of limitations for filing a habeas petition. In *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010), this Court affirmed that a habeas petitioner is entitled to equitable tolling of that one-year period "only if he shows: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." This petition presents two recurring questions of jurisprudential significance involving equitable tolling under AEDPA that have divided the circuits:

1. Whether there is an actual-innocence exception to the requirement that a petitioner show an extraordinary circumstance that "prevented timely filing" of a habeas petition.

2. If so, whether there is an additional actual-innocence exception to the requirement that a petitioner demonstrate that "he has been pursuing his rights diligently."

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. Petitioner is Greg McQuiggin, Warden of a Michigan correctional facility. Respondent is Floyd Perkins, an inmate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a–23a, is reported at 670 F.3d 665. The opinion of the district court, Pet. App. 25a–33a, is not reported but is available at 2009 WL 1788377. The opinion of the state court of appeals, Pet. App. 42a–46a, is not reported.

JURISDICTION

The court of appeals' judgment was entered on March 1, 2012, App. 24a. A petition for rehearing was denied on April 26, 2012, App. 47a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND COURT RULE INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified in relevant part at 28 U.S.C. § 2241 *et seq*.), provides in § 2244:

(d)(1) 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.

Mich. Ct. R. 6.502 Motion for Relief From Judgment

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

* * *

(G) Successive Motions.

* * *

> (2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment *or a claim of new evidence that was not discovered before the first such motion*. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions. [Emphasis added.]

INTRODUCTION

It is not unusual for a convicted criminal to claim he has discovered new evidence of his innocence that he believes serves as a gateway to review a time-barred federal constitutional claim. Indeed, the Antiterrorism and Effective Death Penalty Act (AEDPA) allows an incarcerated inmate to file a habeas petition up to one year after the discovery of new evidence that gives rise to an independent constitutional claim, no matter how much time has elapsed since the conviction. 28 U.S.C. § 2244(d)(1)(D). And this Court has recognized that new evidence supporting a credible claim of actual innocence can serve as a gateway to review claims of federal constitutional error that otherwise are procedurally barred.

It is less common for a prisoner to discover new evidence but then sit on it for several years. Section 2244(d)(1)(D) bars such a prisoner from filing a habeas petition because the delay undermines a competing state interest that grows as time passes: a prosecutor cannot adequately respond to a constitutional claim based on new evidence when witnesses have died or moved away, memories have grown stale, and evidence has deteriorated. That is why Congress, in § 2244(d)(1)(D), required habeas petitioners relying on new evidence to (1) file their habeas claim within a year after discovering the evidence, and (2) pursue their rights diligently. These modest requirements are entirely consistent with post-judgment motion and habeas practice since this country's founding; they also are aligned with a rational defendant's desire for prompt review of his constitutional claims.

Respondent seeks to upset the delicate balance Congress crafted. Perkins, a convicted murderer, claims ineffective assistance of counsel and presents three affidavits that purportedly show his innocence. Perkins obtained these affidavits over a five-year, post-conviction period, then waited six years after receiving the final affidavit before filing a petition. Perkins concedes he did not act diligently but asks the Court to "toll" § 2244(d)(1)(D)'s one-year limitations period indefinitely. The Court should reject that request.

To begin, the notion of indefinite tolling conflicts with § 2244(d)(1)(D). Congress expressly contemplated the scenario in which new evidence materializes years after a conviction, and it created a one-year window to request habeas relief based on that evidence. Indefinite tolling upsets the careful equilibrium between allowing an inmate's constitutional claims that are supported by new evidence to move forward, on the one hand, and state federalism concerns on the other. It would be exceedingly strange for Congress to have included a one-year limitations period and a diligence requirement in § 2244(d)(1) if Congress believed a defendant could circumvent both simply by claiming innocence.

In fact, Perkins is not even advocating for *tolling* in the traditional sense. Tolling is a temporary halt in a limitations period based on some circumstance beyond an individual's control. What Perkins seeks is an unqualified *abrogation* of § 2244(d)(1)'s limitations period based on a circumstance entirely within his own control: pursuit of his own constitutional claim. Congress enacted AEDPA to limit a convicted defendant's habeas rights; the Court should not allow Perkins to use AEDPA to expand those rights.

Enforcing Congress's intent as expressed by the plain language of § 2244(d)(1)(D) will not deprive a potentially innocent but non-diligent inmate of a remedy; it merely cuts off Perkins' federal habeas remedy. Michigan allows inmates to file successive motions for relief from judgment based on new evidence without imposing a limitations period. Mich. Ct. R. 6.502(G)(2). So Perkins can pursue his stale claim, provided he pursues it in a state forum. Perkins also can seek executive clemency, a process this Court has long recognized as the proper venue for a prisoner claiming innocence but lacking a judicial remedy. Conversely, allowing Perkins to circumvent § 2244(d)(1)(D)'s requirements violates fundamental principles of federalism in the post-conviction process.

Accordingly, the State of Michigan respectfully requests that the Court reverse the court of appeals, enforce § 2244(d)(1)(D), and bar Perkins from pursuing his time-barred ineffective-assistance claim.

STATEMENT OF THE CASE

A. AEDPA's one-year limitations period

Congress enacted AEDPA in the wake of the 1993 World Trade Center and 1995 Oklahoma City bombings. Intended to limit the scope of federal habeas review, AEDPA prohibits habeas relief unless the state-court adjudication of a defendant's constitutional claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of" this Court's decisions, or "(2) resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

Section 2244(d)(1) creates a one-year limitations period for filing a habeas petition. That year begins to run from the latest of (A) the date the conviction became final, (B) the date a state-created filing impediment was removed, (C) the date this Court created a new constitutional right deemed retroactive on collateral review, or, the focus here, (D) "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).

Section 2244(d)(1)(D) allows constitutional claims based on "new evidence" (a previously undiscovered factual predicate that supports a claim of constitutional error) to be brought long after conviction. But by requiring a filing within one year after discovery, § 2244(d)(1)(D) promotes the public's interest in the prompt assertion of habeas claims, a state's interest in litigating issues while still fresh, and the convicted defendant's interest in securing release.

B. The murder

Respondent Floyd Perkins "talked a lot about killing people." J.A. 4. Perkins once divulged that if he *were* to kill someone, he would stab the victim in the head, torture the victim, and drag the body off. J.A. 5–6, 22–23. Then Perkins would go home and act "[l]ike nothing happened." J.A. 5–6. Perkins' fantasy is eerily similar to the actual murder of Rodney Henderson.

Perkins believed that Henderson snitched on him about a stolen car. J.A. 69–70. The die was cast; as Perkins told Torriano Player: "Rodney gots to go." J.A. 68. Perkins repeatedly told another friend, Chauncy Vaughn, that he would kill Henderson. J.A. 25.

On the day of the murder, Perkins attended a party with Henderson and Vaughn, where they met 15-year-old DeMarr Jones. J.A. 25. Perkins claims Jones was the sole murderer. While at the party, Perkins revealed his plan to Vaughn: "hey, Chuck, I'm going to go ahead and do it. . . . Go ahead and get it over with." J.A. 27. Perkins' plan was to take Henderson to a trail behind Dukette School. J.A. 30. Vaughn understood that Perkins was talking about killing Henderson and implored him "not to do it." J.A. 29.

Perkins ignored Vaughn and left the party with Henderson and Jones, then suggested that the three of them go to a store to buy alcohol. J.A. 30, 51–52. While Henderson was outside the store, Perkins told Jones: "I'm going to do Rodney." J.A. 52. Back outside, Perkins suggested that they walk down the Dukette Trail to meet some girls. J.A. 53.

Perkins apparently invited Jones to help and invented a signal so Jones would know when to begin assaulting Henderson; Perkins would say "it's cold." J.A. 37–38. As the group walked down the path, Perkins pronounced "it's cold," but Jones apparently wasn't ready to attack. J.A. 38, 54. Perkins repeated "it's cold," turned around, and saw Henderson's back to him. J.A. 38, 55. So Perkins pulled out his knife and began stabbing Henderson. *Id*. Henderson fell to the ground and begged for his life: "all right man, quit, whatever I did, I'm sorry." J.A. 55. Ignoring Henderson's pleading, Perkins played with his victim, repeatedly cutting and slicing Henderson's neck, face, and lower lip. J.A. 16–22. The torture ended with a final penetrating stab through Henderson's skull into his brain. J.A. 19.

Perkins and Jones arrived at Vaughn's house roughly one hour after they had left the party with Henderson. J.A. 30–31. Perkins informed Vaughn that "it's done," referring to Henderson's murder. J.A. 31. Perkins and Jones then went to the rest room and turned on the faucet. Vaughn "concluded they washed themselves off." J.A. 32.

Later, Perkins called Vaughn and confessed in detail to the murder he had committed. J.A. 37–38. Perkins described that he was walking down the path with Henderson and Jones and gave the signal that "it was cold." *Id*. Perkins also described how he stabbed Henderson from behind. J.A. 38.

Meanwhile, Torriano Player knew his friend Henderson was missing. J.A. 71. Vaughn told Player that Perkins had confessed to killing Henderson. J.A. 34, 72. Distraught, Player went to see Perkins and told him that he "didn't want Rodney's body just laying out there in the snow." J.A. 73. Perkins said he understood. *Id*. After Player promised that he "wasn't gonna snitch on" Perkins, Perkins disclosed where Henderson's body was. *Id*.

Player understandably was upset that Perkins had killed his friend. J.A. 74. This troubled Perkins, who said that he "wouldn't have . . . killed" Henderson if he had known that the murder would come between himself and Player. *Id*. Perkins later confessed to Vaughn that if Perkins "couldn't have Torry [Player] . . . he might as well turn himself in." J.A. 35. Later, Perkins did just that, hoping to "make things better" with Player. J.A. 76.

C. The trial and direct appeal

At trial, Perkins admitted that he, Henderson, and Jones left the party together and went to the store. J.A. 84. But Perkins claimed that when he exited the store, Henderson and Jones were gone, so he went to hang out with his girlfriend, Denise Hunter (the mother of his child) and Peter Junior, the two alibi witnesses Perkins called at trial. J.A. 84, 86–88, 101–105, 106–11. Perkins said that, after he left Junior and Hunter, he saw Jones standing under a street light, covered with blood. J.A. 89–90.

The prosecutor told the jury that Jones likely had a role in Henderson's death, but that the evidence demonstrated Perkins' guilt. J.A. 113–14. Indeed, the crime was entirely consistent with what Perkins had told his friends, Vaughn and Player, he planned to do; occurred exactly the way that Perkins described it to Vaughn over the phone after-the-fact; and was the only way to make sense of Perkins' post-murder "apology" to Player and his decision to turn himself into the police.

The jury rejected Perkins' alibi defense and found him guilty of first-degree murder, and the Michigan trial court sentenced Perkins to life in prison.[1] The Michigan Court of Appeals affirmed, Pet. App. 42a–46a, and the Michigan Supreme Court denied leave to appeal on January 31, 1997, Pet. App. 41a.

---

[1] The Sixth Circuit panel said that what happened "is in dispute." Pet. App. 3a. That statement is true in virtually every criminal case. But the panel failed to recognize that a jury found Perkins guilty beyond a reasonable doubt.

D. Perkins' untimely habeas petition

Absent the discovery of new evidence of innocence, AEDPA required Perkins to file his petition for habeas corpus within one year of his conviction, i.e., no later than May 5, 1998. 28 U.S.C. § 2244(d)(1)(A). He did not. Instead, Perkins waited until June 13, 2008, to file—more than 10 years later.

To circumvent § 2244(d)(1)'s one-year limitations period, Perkins alleged that new evidence of actual innocence supported his ineffective-assistance claim. That evidence consisted of three affidavits, one each from Perkins' sister, a friend's younger brother, and a dry-cleaning clerk named Linda Fleming. Pet. App. 4a. The affidavits purport to corroborate the same defense ("Jones did it") the jury rejected. And Perkins admits he knew his sister's statement at the time of trial.

The three affidavits were dated January 30, 1997, March 16, 1999, and July 16, 2002. Pet. App. 4a. Thus, even under a "new evidence" theory, AEDPA's one-year limitations period expired on July 16, 2003, at the latest. Pet. App. 4a. But Perkins did not file his petition until June 13, 2008—nearly five years later. Pet. App. 4a.

E. District court proceedings

The district court denied Perkins' petition because the affidavits failed to satisfy the strict standard for proving actual innocence in support of a constitutional claim: new, reliable evidence that demonstrates factual innocence, not mere legal insufficiency. Pet. App. 30a (citing *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995)).

Alternatively, the district court said that the Sixth Circuit's decision in *Souter* v. *Jones*, 395 F.3d 577 (6th Cir. 2005)—which allowed equitable tolling of § 2244's one-year limitations period—does not mean that an actual-innocence claim tolls the limitations period indefinitely. Pet. App. 31a. "[T]he Supreme Court has clearly indicated that equitable tolling, regardless of its basis, always requires the petitioner to demonstrate that he has acted diligently to pursue his rights." Pet. App. 31a (citing *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). Accord *Holland*, 130 S. Ct. at 2562 (equitable tolling of AEDPA's one-year limitations period requires petitioner's diligent pursuit).

F. Sixth Circuit ruling

The Sixth Circuit reversed. Relying on its previous decision in *Souter*, the Sixth Circuit first held that Perkins' "gateway actual innocence claim" allowed him to present his habeas petition "as if he had not filed it late." Pet. App. 8a. The Sixth Circuit said that nothing in this Court's *Holland* analysis calls *Souter* into question. Pet. App. 9a–11a. That is because *Holland* "does not indicate that a credible claim of actual innocence is not . . . an 'appropriate' case" for tolling. Pet. App. 11a. The Sixth Circuit so held even though *Holland* specifically tied equitable tolling to an extraordinary circumstance that "*prevented timely filing*"—a prerequisite that does not exist when a habeas petitioner can cite no reason for filing his petition many years after discovering the purported new evidence. The Sixth Circuit was satisfied that the "majority of circuits that have considered the actual-innocence gateway post-*Holland* agree" with *Souter*. Pet. App. 12a.

Next, again relying on *Souter*, the Sixth Circuit held that Perkins need not even prove reasonable diligence to invoke equitable tolling. Pet. App. 16a. The Sixth Circuit acknowledged that this Court's language in *Holland* regarding diligence "is seemingly at odds" with *Souter*. Pet. App. 14a. But the court distinguished *Holland* and *Pace* because neither involved an actual-innocence theory. Pet. App. 16a. "In fact, the Supreme Court has never required reasonable diligence to be shown when seeking equitable tolling due to actual innocence," said the court. Pet. App. 16a.

Finally, the Sixth Circuit declared that whether Perkins "is actually innocent is not for us to decide." Pet. App. 20a. The court remanded "so that the district court may *fully* consider whether Perkins asserts a credible claim of actual innocence." Pet. App. 21a (emphasis added).

SUMMARY OF ARGUMENT

1. Congress enacted in AEDPA a provision to address precisely the situation presented here: a defendant's unexcused delay in bringing a habeas action that asserts a constitutional claim based on new evidence.

To encourage expediency and mitigate the dangers of delay, Congress implemented a one-year limitations period that runs from "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)(D). The Sixth Circuit examined this text; dismissed it as inequitable for a petitioner who, like Perkins, claims actual innocence; and replaced it with an indefinite tolling rule.

It is true that this Court in *Holland* held that AEDPA's generic one-year limitations period "is subject to equitable tolling in appropriate cases." 130 S. Ct. at 2560. The Court declined to construe AEDPA "to displace courts' traditional equitable authority absent the clearest command," *id.* at 2560–61 (quotations omitted), and Congress enacted AEDPA aware that the Court "would apply the presumption." *Id.* at 2561. Accordingly, a habeas petition can avoid AEDPA's generic one-year limitations period if an extraordinary circumstance prevented the timely filing and the petitioner can show that he pursued his claim diligently. *Holland*, 130 S. Ct. at 2562.

But there is no traditional equitable authority that justifies Perkins' indefinite tolling theory for habeas claims based on new evidence. To the contrary, American courts traditionally have required that criminal defendants present new-evidence claims promptly, within a finite period of time. And it makes no sense to assume that Congress created a one-year window for filing a constitutional claim based on new evidence all the while assuming that federal courts would not apply the limitation to the "rare" instance when a defendant claims he is innocent.

There is injury to the federal-state relationship when federal courts allow a defendant an indefinite time to file a federal habeas claim based on new evidence. Reexamining state convictions on federal habeas impinges on state sovereignty and the notion that states have the capability to prosecute, convict, and sentence criminals in accord with state law and processes. The Court should reject Perkins' request to abrogate § 2244(d)(1)(D) with an indefinite tolling rule.

2. The Sixth Circuit did not stop at allowing Perkins to circumvent § 2244(d)(1)(D)'s one-year limitations period. The court also eliminated any requirement that a habeas petitioner act diligently when pursuing a constitutional claim based on new evidence. Again, there is no equitable principle that justifies such a result. Since at least 1851, American courts have required convicted defendants to present new evidence in a diligent manner. That approach is consistent with a bedrock equitable principle: a person cannot ask a court to use its equitable powers to excuse his or her own lack of diligence. And that principle aligns precisely with the interests of an actually innocent defendant's interest in having his underlying constitutional claim adjudicated timely.

What Perkins seeks—indefinite tolling—is not actually *tolling* at all. "Tolling" contemplates a temporary cessation of the running of the limitations period due to an event beyond the petitioner's control. What Perkins seeks, and what the Sixth Circuit ratified, is a wholesale abrogation of the one-year window for filing in habeas a constitutional claim based on new evidence. Equity has never recognized such a rule.

Perkins can find no support for his indefinite-tolling theory without any diligence requirement in this Court's gateway actual-innocence cases. In those cases, a habeas petitioner does not seek to use new evidence to prove his underlying constitutional claim; the new evidence merely establishes the "gateway" that allows the petitioner to litigate a procedurally defaulted claim in the circumstance where the petitioner is unable to prove cause and prejudice.

In contrast here, Perkins seeks to use new evidence to *prove* his underlying ineffective-assistance claim. Section 2244(d)(1)(D) does not even apply unless the new evidence that creates the one-year filing window is the factual predicate for the underlying constitutional claim or claims the petitioner seeks to pursue. 28 U.S.C. § 2244(d)(1)(D).

Moreover, in every case in which the Court has allowed a petitioner to use an actual innocence claim as a gateway to review of a federal constitutional violation, the petitioner raised that federal claim in a diligent manner. The Court never has exercised its equitable power to create an unlimited time frame for filing a habeas claim based on claims of innocence.

3. There is no need to abrogate AEDPA's limitations period to create a federal remedy in this case when Perkins has alternate state-law remedies available. For example, Michigan allows a convicted defendant to file successive motions seeking relief from judgment based on new evidence, and it does so without any time limitation. Mich. Ct. R. 6.502(G)(2). And this Court has long recognized that the power of clemency is the traditional guardian against miscarriages of justice where there is no judicial remedy. The courts should not usurp the post-conviction processes Michigan has adopted by disavowing the federal limitation Congress created.

For all of these reasons, the Court should reject Perkins' theory that he can indefinitely toll § 2244(d)(1)(D)'s one-year limitations period simply by asserting his innocence.

ARGUMENT

I. There is no actual-innocence exception to § 2244(d)(1)(D)'s one-year window for filing in habeas a constitutional claim based on new evidence.

A. Section 2244(d)(1)(D)'s text forecloses any argument that a habeas petitioner has unlimited time to present new evidence in support of a constitutional claim.

Section 2244(d) establishes a detailed system for determining when AEDPA's one-year limitations period begins to run. Included within that system is a specific trigger for the precise circumstance presented here: a constitutional claim based on new evidence. Congress anticipated this situation and said that the one-year window for filing such a claim runs from "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)(D).

Congress also provided for petitioners who already filed a petition for habeas relief, only to discover new evidence after that proceeding concluded. In 28 U.S.C. § 2244(b)(2)(B), Congress lifted AEDPA's prohibition on successive petitions where facts underlying a new claim would establish by clear and convincing evidence that a reasonable juror would not have found him guilty of the underlying offense. So there is no need for the courts to act in equity to provide additional time for persons who allege actual innocence as a gateway to their claims of constitutional error. Congress opened the gate by enacting § 2244.

Perkins' request for indefinite tolling renders superfluous this carefully scripted scheme. Under Perkins' theory, it does not matter how long a defendant waits after he discovered, or should have discovered, new evidence. According to Perkins, a habeas petitioner can uncover a new witness, convert the witness's testimony to an affidavit, wait 50 years or longer, and then file a constitutional claim in federal court based on that new evidence.

Perkins' proposed rule encourages gamesmanship. If a defendant believes new evidence is strong enough to both overcome the state's evidence against him and establish an underlying constitutional claim, he will file promptly. But if the evidence may be insufficient to withstand countervailing testimony at a hearing, a defendant with a long sentence has incentive to delay, such as waiting for the death of an elderly prosecution witness. That ability to simply "outwait" the evidence places the prosecution at a severe disadvantage.

In sum, § 2244(d)(1)(D)'s language is clear, unambiguous, and supported by valid policy reasons regarding finality of convictions. As Judge Easterbrook put it, although § 2244 "leaves some (limited) room for equitable tolling, courts cannot alter the rules laid down in the text." *Escamilla* v. *Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005) (citation omitted). "Section 2244(d) has a rule for when new factual discoveries provide a fresh period for litigation; unless that standard is met, a contention that the new discoveries add up to actual innocence is unavailing. Prisoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action." *Id.*

B. Equity provides no basis for discarding the time limit § 2244(d)(1)(D) creates.

In *Holland*, this Court held that AEDPA's general one-year statute of limitations was subject to equitable tolling. *Holland*, 130 S. Ct. at 2560. That decision was based, in part, on the Court's recognition of long-standing equitable principles that allowed federal courts to excuse a failure to comply with federal timing rules. *Id*. That is, when Congress enacted the one-year statute of limitations, it did so with the full knowledge that such limitations periods normally are subject to equitable tolling. Because Congress did not use language that specifically called these equitable powers into question, this Court concluded that "basic habeas corpus principles" under which "a petition's timeliness was always determined under equitable principles" remained in force. *Id*. at 2562. Thus, this Court recognized that AEDPA's general one-year limitations period for state prisoners seeking federal habeas relief is subject to equitable tolling, but only if the petitioner makes two threshold showings: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way' and prevented timely filing." *Id*. at 2562 (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Application of the same analysis here compels rejection of Perkins' position that § 2244(d)(1)(D) is amenable to equitable abrogation. That is because there is no equitable tradition of allowing defendants who claim actual innocence an indefinite period of time to file a constitutional claim based on new evidence. American courts historically have required *timely* filing of post-judgment claims based on new evidence.

New trials were not available in England until the close of the 17th century, and then they primarily were available only for misdemeanor cases. *Herrera* v. *Collins*, 506 U.S. 390, 408 (1993) (citation omitted). Common-law courts created a remedy for an accused seeking to correct an error of fact by a proceeding called a writ *coram nobis*. *Sanders* v. *Indiana*, 85 Ind. 318, 325; 1882 WL 6389 (Ind. 1882). The writ was commonly used in civil cases and was seldom relied on in criminal matters. *Id*. The errors addressed by the writ related primarily to defective process or a party's capacity. Morgan Prickett, *Writ of Error Coram Nobis in California*, 30 Santa Clara L. Rev. 1, 3 (1990). In a note to Blackstone's Commentaries, Judge Thomas M. Cooley noted that the writ *coram nobis* "was necessary to suggest a new fact upon the record from which the error in the first judgment will appear[.]" *Id*. (quoting W. Blackstone, Commentaries on the Laws of England (T. Cooley ed. 1899)). While the writ was not subject to a statute of limitations, parties seeking a remedy under a writ *coram nobis* were required to prove that they had proceeded with reasonable diligence. *Tennessee* v. *Mixon*, 983 S.W.2d 661, 667 (Tenn. 1999) (citing 18 Am. Jur. 2d *Coram Nobis and Allied Statutory Remedies* § 31 (1985)).

In accord with the English practice, the U.S. Constitution says nothing about new trials, whether they are based on new evidence or otherwise. *Id*. In fact, as explained by the Supreme Court of Kansas, "in no case is it held [that a right to a new trial is] a constitutional grant. It is a *privilege* offered by the law to the accused, in addition to the *guaranties* offered by the Constitution." *Kansas* v. *McCord*, 8 Kan. 232; 1871 WL 765, at *5 (Kan. 1871).

Congress acted to extend that privilege, but subject to traditional restrictions. The First Congress enacted legislation allowing new trials for "reasons for which new trials have usually been granted in courts of law." 1 Stat. 83. But like § 2244(d)(1)(D), the courts imposed very strict time limits. "The early federal cases adhere[d] to the common-law rule that a new trial may be granted only during the term of court in which the final judgment was entered." *Herrera*, 506 U.S. at 408 (citations omitted). A court in a subsequent term was limited to correcting "inaccuracies in mere matters of form, or clerical errors." *Id*. (citation omitted).

By the middle of the 20th century, courts and legislatures began to provide defendants with expanded—but still strictly limited—time to file a motion for a new trial. For instance, in 1929, Wisconsin enacted a statute that allowed defendants to file a motion for a new trial "at the term in which the trial of any indictment or information shall be had or within one year thereafter." Wisc. Stat. 1929, § 358.06. Connecticut allowed defendants to file a motion for a new trial up to three years after judgment. Conn. Gen. Stat., 1930, § 6560. This Court adopted an expanded 60-day time frame to file a motion for a new trial based on newly discovered evidence. *Herrera*, 506 U.S. at 408. Following the creation of the 60-day rule, there was substantial debate over whether the time limit should be abolished or whether to retain a time limit in order to promote finality. *Id*. This Court answered that question by adopting Federal Rule of Criminal Procedure 33, which provides defendants with what is now a three-year time limit after the verdict for filing new trial motions based on new evidence. *Id*.; Fed R. Crim. P. 33(1)(a).

Now consider AEDPA, a statute intended to "curb the abuse of the statutory writ of habeas corpus." H.R. Rep. No. 104-518, at 111 (1996). In adopting AEDPA, Congress sought to "compel habeas petitions to be filed promptly after conviction and direct review, to limit their number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances." *David* v. *Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (citing 28 U.S.C. § 2244(d)(1)(A)–(D); H.R. Rep. No. 104-518, at 111 (1996)).

Amidst the reforms, Congress implemented a safety valve. Section 2244(d)(1)(D) allows a petitioner to present new evidence to establish that a constitutional violation occurred at his trial. The time within which to file a claim based on new evidence starts to run on the date the petitioner discovers—or with reasonable diligence should have discovered—that new evidence.

In other words, § 2244(d)(1)(D) recognizes the need to provide a petitioner additional time if he *could not have filed* his petition earlier based on the unavailability of newly discovered evidence. But "one who has a known claim, defers presenting it, and then asks to be excused for the delay is unlikely to get cut much slack." *David*, 318 F.3d at 348. Unlike the equitable tolling that this Court applied in *Holland*, Perkins does not invoke "equitable principles [that] have traditionally governed the substantive law of habeas corpus." *Holland*, 130 S. Ct. at 2561 (quotations omitted). There was no reason for Congress to create a one-year window for filing claims based on new evidence if a petitioner could simply circumvent the limitations period by claiming actual innocence.

At bottom, Perkins is not actually asking this Court to toll § 2244(d)(1)(D) at all. The concept of tolling is that it suspends the running of a limitations period; once the tolling ends, the limitations period begins running again. *Chardon* v. *Fumero Soto*, 462 U.S. 650, 652 n.1 (1983) ("tolling" means that "during the relevant period, the statute of limitations ceases to run"). Under Perkins' approach, however, the limitations period never begins to run again—not on the date he discovered new evidence, not on the date he could have discovered new evidence, not on any date. That it is not tolling—it is wholesale abrogation.[2]

As noted above, Congress did not intend to abrogate AEDPA's limitations period whenever a petitioner asserts a claim (colorable or not) of actual innocence. To the contrary, Congress specifically addressed the intersection of the limitations period and actual innocence claims in § 2244(b) and (d)(1)(D). And it does not matter whether § 2244(d)(1)(D) is characterized as an accrual provision or a tolling provision. See *Holland*, 130 S. Ct. at 2561–62. Congress decided that a petitioner has one year from the date on which new evidence could have been discovered to file his petition, and it enacted a statute that serves the same purpose as equitable tolling. That policy judgment cannot be set aside, particularly in the absence of a "strong equitable claim" (such as extraordinary circumstances) that otherwise would justify keeping the federal courthouse doors open. *Id*. at 2562.

---

[2] Perkins has said that his position does not make § 2244(d)(1)(D) a nullity because a petition still must "demonstrate a credible claim of actual innocence before a court will reach the merits of his constitutional claims." Br. in Opp. 13. That argument ignores § 2244(d)(1)(D)'s purpose—to bar stale claims altogether.

C. There are high costs to allowing an indefinite time within which to file a federal claim based on new evidence.

This Court has recognized "the significant costs of federal habeas corpus review." *McCleskey* v. *Zant*, 499 U.S. 467, 490–91 (1991). The writ "strikes at finality." *Id*. at 491. And "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Id*. (quoting *Teague* v. *Lane*, 489 U.S. 288, 309 (1989)). Whenever a habeas petitioner obtains a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." *Id*. (quotation omitted).

"Finality has special importance in the context of a federal attack on a state conviction." *McCleskey*, 499 U.S. at 491 (citations omitted). "Reexamination of state convictions on federal habeas frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id*. (quotations omitted). While our federal system acknowledges state power to uphold societal norms by enacting criminal laws, "the power of a State to pass laws means little if the State cannot enforce them." *Id*.

There are additional costs of habeas review. "Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *McCleskey*, 499 U.S. 491 (citation omitted). And "habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id*. at 491–92 (citations omitted).

Moreover, "principles of federalism and comity [are] at stake" when state prisoners attempt to use the federal courts to attack their final convictions. *District Attorney's Office* v. *Osborne*, 557 U.S. 52, 76 (2009) (Alito, J., concurring). This Court has defined "comity" as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

Allowing a state prisoner to lie in wait and use stale evidence to collaterally attack his conviction in federal court at a time of his own choosing (e.g., when an elderly witness has died and cannot appear at a hearing to rebut the new evidence) is fundamentally inconsistent with federalism and comity. Here, for instance, Perkins' trial took place *19 years ago*. The federal courts should respect Congress's policy decision to deny a federal habeas remedy and instead defer to states regarding whether and how to process such a claim.[3]

---

[3] While there is already some prejudice to a state in defending a constitutional claim filed pursuant to § 2244(d)(1)(D), its ability to contradict new evidence is further compromised when the evidence supporting the constitutional claim is itself stale. Here, the affidavit of the only disinterested witness, Linda Fleming, the dry-cleaning clerk, was obtained a decade ago. Any evidence that would confirm or refute her affidavit is likely undiscoverable, leaving Michigan in a federal proceeding at the mercy of Fleming's fallible memory.

II. There also is no actual-innocence exception to the traditional requirement that a convicted defendant act diligently in pursuing his claims for relief from judgment.

A. Equity always requires a claimant to diligently pursue his claims.

Even when allowing for equitable tolling in *Holland*, this Court maintained the long-recognized equitable requirement that a party who invokes tolling must show "that he has been pursuing his rights diligently." *Holland*, 130 S. Ct. at 2562. There is no equitable principle that allows a court to simply disregard a limitations period altogether, regardless of timeliness or diligence. Perkins' theory—that he need not demonstrate diligence to "toll" § 2244(d)(1)(D) indefinitely because he claims actual innocence—swims against the currents of history.

American courts and state legislatures consistently have followed the common-law requirement that a defendant present new evidence in a diligent manner. That trend can be traced as far back as 1851, when the Georgia Supreme Court required a convicted defendant seeking a new trial based on newly discovered evidence to prove that "it was not owing to the want of due diligence that [the motion] did not come sooner." *Berry* v. *Georgia*, 10 Ga. 511; 1851 WL 1405, at *12 (Ga. 1851). Other States followed suit, adopting the *Berry* rule "to protect [the Court] from imposition[.]" *Missouri* v. *McLaughlin*, 27 Mo. 111; 1858 WL 5874, at *1 (Mo. 1858). Federal courts have "frequently quoted and followed" the *Berry* rule. *United States* v. *Johnson*, 327 U.S. 106, 110 n.4 (1946).

Congress imposed one kind of diligence in § 2244(b) and (d)(1)(D), requiring a habeas petitioner to diligently pursue new evidence to take advantage of (d)(1)(D)'s extension of the limitations period. But if there is to be equitable "tolling" of § 2244(d)(1)(D)'s one-year window, equity requires a second kind of diligence—diligent pursuit of the legal claim. Federal courts "have typically extended equitable relief only sparingly," allowing tolling only in those situations "where the claimant has actively pursued his judicial remedies." *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Id*. (citing *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984). Simply put, one "who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County*, 466 U.S. at 151.

In sum, a habeas petitioner seeking to bring a constitutional claim based on new evidence has only one year following discovery within which to pursue that federal claim. 28 U.S.C. § 2244(d)(1)(D). But even if this Court were inclined to suspend that limitations period indefinitely for a defendant claiming actual innocence, there is no basis for jettisoning equity's long-standing diligence requirement. Because Perkins has not even alleged, much less proven, that he pursued his ineffective-assistance claim with diligence after he obtained the three new affidavits, there is no equitable basis on which to relieve him of the one-year limitations period.

B. Requiring a habeas petitioner to pursue diligently a constitutional claim based on new evidence is not inconsistent with this Court's decisions excusing a procedural bar based on actual innocence.

The Sixth Circuit agreed to dispense with diligence as a prerequisite to equitable tolling based on this Court's *House* v. *Bell* line of cases, which consider actual innocence as a "gateway" to review procedurally barred claims without regard to cause and prejudice. Pet. App. 16a. See *House* v. *Bell*, 547 U.S. 518 (2006). For three reasons, the Sixth Circuit erred.

First, there is nothing incongruous about allowing a defendant claiming actual innocence to overcome a *procedural* bar without showing more, while a defendant asserting a constitutional claim based on *new evidence* under § 2244(d)(1)(D) must diligently pursue that claim. A defendant seeking to litigate a claim that he procedurally defaulted cannot expand the record with the evidence he presents to prove his innocence. That evidence is merely the "gateway" to arguing the underlying but defaulted constitutional claim.[4]

---

[4] This Court explained the difference between a "gateway" innocence claim and a freestanding innocence claim in *Schlup* v. *Delo*, 513 U.S. 298, 315 (1995):

> Schlup's claim thus differs in at least two important ways from that presented in *Herrera*. First, Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims. Schlup's claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."

For example, consider a defendant convicted of sexual assault who tries to raise a procedurally defaulted ineffective-assistance claim based on the failure to call an alibi witness. Assume further that the defendant cannot show cause and prejudice. If the defendant uncovers exculpatory DNA evidence, he can use that evidence of innocence as a gateway to have a court consider his ineffective-assistance claim, but the DNA evidence cannot be used to prove that claim. Excusing a procedural default based on an actual innocence claim does not invite the use of stale evidence, as does the situation presented here.

Now consider Perkins. He is attempting to use the alleged new evidence of his innocence—the affidavit testimony of three new witnesses—to *establish* his underlying ineffective-assistance claim; in fact, § 2244(d)(1)(D) only applies if the new evidence that re-opened the one-year filing window is "the factual predicate *of the claim or claims presented*." It is this merits use of new evidence that forces the prosecutor to rebut new testimony such as that presented here, some of which is more than a decade old. And there is no reason why the problem arises only after 10 years; Perkins could have just as easily waited 50 years to bring his claim. Perkins' situation is not at all comparable with that of procedural default.

That is why enforcing traditional notions of equity and requiring diligent prosecution of new evidence supporting a constitutional claim does not render the gateway-of-actual-innocence theory "redundant." Pet. App. 15a. A defendant using new evidence in a timely filing to pursue a procedurally defaulted claim may very well be allowed to proceed. In contrast, a

defendant like Perkins—who claims actual innocence to excuse his lack of diligence in presenting new evidence to support his constitutional claim—is barred by § 2244(d)(1)(D). When a defendant uncovers new evidence, he has one year to file a federal habeas petition raising a constitutional claim based on that evidence. Period.

Second, there is no conflict between *Holland*'s diligence requirement and the *House* holding that a defendant with an "extraordinary" case for actual innocence based on new evidence is excused from procedural fault and may litigate his underlying constitutional claim. See *House*, 547 U.S. at 536–37. In *House* and similar cases, this Court did not address a habeas petitioner's lack of diligence in presenting the new evidence purportedly showing actual innocence; the issue presented was whether a petitioner could overcome procedural default despite an inability to prove cause for and prejudice from the default itself. *House*, 547 U.S. at 536 ("the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration") (quotations omitted); *Schlup* v. *Delo*, 513 U.S. 298, 314–15 (1995) ("Because Schlup has been unable to establish 'cause and prejudice' sufficient to excuse his failure to present his evidence," he "may obtain review of his constitutional claims only if he" establishes an actual-innocence gateway to relief); *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986) ("in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

So even if the *House* line of cases suggests that actual innocence can excuse procedural default, it does not suggest that a defendant can delay indefinitely the assertion of actual innocence based on new evidence. The Court did not address the diligent-pursuit requirement one way or the other.

Finally, *House* involved an equitable exception to an equitable rule created by the Court itself. See *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012) (reaffirming the equitable nature of the cause-and-prejudice standard). Here, by contrast, Congress enacted a specifically applicable statute that Perkins seeks to override. Unlike the *House* cases, Perkins' theory has significant separation-of-powers implications.

III. Enforcing § 2244(d)(1)(D) does not leave Perkins without a remedy.

Rejecting Perkins' invitation to abrogate AEDPA's statute of limitations would not leave Perkins without a remedy; he has at least two others that he can pursue. First, Michigan allows post-judgment motions based on new evidence with no limitations period. Mich. Ct. R. 6.502(G)(2). Second, Perkins can seek clemency from Michigan's governor—the traditional remedy for prisoners who claim actual innocence but who are time barred from asserting a claim based on new evidence. In other words, enforcing § 2244(d)(1)(D) does not deprive Perkins of all remedies—only a federal habeas remedy.

Under Michigan law, a prisoner can file a post-judgment motion based on new evidence with *no* limitations based on time of filing. Mich. Ct. R. 6.502(G)(2). And this rule applies in Michigan even

when that prisoner already has previously filed a post-judgment motion for relief from judgment. *Id.* If the prisoner demonstrates that he has new evidence, he will then attempt to prove that his motion warrants relief under Mich. Ct. R. 6.508, including the familiar "cause and prejudice" test for failing to raise the grounds for relief at an earlier stage of the proceeding. Mich. Ct. R. 6.508(D)(3)(a), (b). But even then, the Michigan trial court "may waive the 'good cause' requirement" if the court "concludes that there is a significant possibility that the defendant is innocent of the crime." Mich. Ct. R. 6.508(D)(3).

It certainly would be a curious application of equity to grant Perkins indefinite tolling for filing a federal claim when he has an adequate state-court remedy to pursue the relief he seeks. And it would be a tremendous imposition on state sovereignty and principles of federalism to force a state to litigate stale habeas claims in federal court when the state already has extended an avenue for relief that is much broader even than that offered in the federal system. The Court should decline Perkins' invitation to do so.

Wholly aside from Michigan's criminal rules of procedure, the historical remedy for preventing miscarriages of justice where the judicial process has been exhausted is to seek executive clemency. *Herrera*, 506 U.S. at 411–12. The power of the executive to act as a court of equity has been a recognized feature of the common law for well over a millennia. *Id.* at 412. Blackstone noted the power of clemency as one of the great achievements of English law—"that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of

equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment." *Id.* (quoting 4 W. Blackstone, Commentaries 397).

In the United States, executive clemency has provided the "fail safe" in our criminal justice system. *Herrera*, 506 U.S. 415. The same is true in Michigan, where the state constitution grants the governor the power to grant reprieves, commutations, and pardons after conviction. Mich. Const. art. V, § 14.

In short, Michigan law provides Perkins with two independent avenues by which he can pursue his claim. Reading § 2244(d)(1)(D)'s one-year limitations period out of AEDPA on "equitable" grounds is unwarranted and unnecessary.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Mark G. Sands
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: DECEMBER 2012