No. 12-126

IN THE

Supreme Court of the United States

GREG MCQUIGGIN,

Petitioner,

v.

FLOYD PERKINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether the 1-year limitations period in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(d)(1), incorporates the traditional equitable miscarriage of justice exception to procedural defaults—an exception that was firmly rooted in this Court's decisions before AEDPA's enactment and that excused a habeas petitioner's failure to follow proper procedure if the petitioner presented a colorable claim of actual innocence.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

INTRODUCTION

Like most habeas petitioners, Floyd Perkins asserted claims of constitutional error at trial in his federal habeas petition. Unlike most petitioners, however, Perkins coupled those claims with new evidence indicating his actual innocence of the crime of which he was convicted. In the equitable habeas setting, federal courts have always tested the strength of a "gateway" assertion of innocence, even in the face of countervailing federal and state procedural rules. Failing to do so, this Court has held, risks sanctioning an unbearable miscarriage of justice.

That a colorable assertion of innocence requires resolution derives from the writ's equitable nature. "[H]abeas corpus is, at its core, an equitable remedy," *Schlup v. Delo*, 513 U.S. 298, 319 (1995), and the "Great Writ" thus demands that "a strong equitable claim" be heard. *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010). In that respect, innocence is the "ultimate equity," *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.), and so courts have ensured "that federal constitutional errors do not result in the incarceration of innocent persons," *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

To avoid a "fundamental miscarriage of justice" from imprisoning an innocent person, *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (internal citation and quotation marks omitted), the Court has recognized the equitable "miscarriage of justice" exception to procedural default. The exception—which allows federal courts to address procedurally deficient constitutional claims accompanied by a credible showing of innocence—"insure[s] that miscarriages of justice

within [the writ's] reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). Before the Antiterrorism and Effective Death Penalty Act (AEDPA), the exception was "'[w]ell defined in the case law,' and 'familiar to federal courts.'" *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *McCleskey v. Zant*, 499 U.S. 467, 496 (1991)). It imposed a demanding standard—that a petitioner show that "it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence" not presented at trial. *Schlup*, 513 U.S. at 327. But where the petitioner met this standard, the exception acted as an *independent* basis for habeas review—even if the petitioner failed to diligently pursue his claims. *See McCleskey*, 499 U.S. at 493-95.

AEDPA did not override this longstanding exception. In *Holland*, the Court held that where "equitable principles have traditionally governed," federal courts should not "construe a statute to displace courts' traditional equitable authority absent the clearest command." 130 S. Ct. at 2560 (internal citations and quotation marks omitted). AEDPA lacks a clear command overriding the traditional miscarriage of justice exception. Accordingly, the appellate courts have uniformly recognized after *Holland* that untimely habeas claims may be considered if the petitioner can make a credible showing of innocence. (Pet. App. 16a-20a); *see Rivas v. Fischer*, 687 F.3d 514, 547-52 (2d Cir. 2012); *Lee v. Lampert*, 653 F.3d 929, 932-36 (9th Cir. 2011) (*en banc*); *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011); *Lopez v. Trani*, 628 F.3d 1228, 1231 (10th Cir. 2010).

The decision below thus follows the settled path set out by the Court for interpreting AEDPA against

the backdrop of traditional equitable notions. *Schlup* articulates the standard for weighing assertions of innocence as a gateway in the habeas context, and *Holland* confirms that settled equitable notions were not displaced by AEDPA. To the same end is *House v. Bell*, where the Court relied on the miscarriage of justice exception after AEDPA to permit a petitioner to present his claims despite a procedural default in state court. 547 U.S. 518, 538 (2006). And, as the Court has explained, it "would make 'scant sense' to treat AEDPA's statute of limitations," the constraint at issue here, differently "from other threshold constraints on federal habeas petitioners," for instance, the constraint at issue in *House*. *Wood v. Milyard*, 132 S. Ct. 1826, 1833 (2012) (quoting *Day v. McDonough*, 547 U.S. 198, 209 (2006)).

While habeas claims may be plentiful, claims of innocence are not. As Judge Friendly observed over 40 years ago, and as the Court more recently confirmed, "'the one thing almost never suggested on collateral attack is that the prisoner [is] innocent of the crime.'" *Schlup*, 513 U.S. at 322 (quoting Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970)). In the narrow range of cases where a colorable claim of innocence is alleged, however, courts have not turned away those petitioners on procedural grounds, given the grave possibility of a miscarriage of justice. AEDPA did not command otherwise. Perkins (and others like him) deserves a hearing on whether his new evidence suffices to pass through the actual-innocence gateway, allowing his claims to be heard on the merits. Equity demands no less.

STATEMENT OF THE CASE

On March 4, 1993, Perkins attended a party in Flint, Michigan, with his friend, Rodney Henderson, and an acquaintance, Damarr Jones. The three left the party together. Henderson was later discovered on a wooded trail, murdered by stab wounds to the head. (Pet. App. 2a-3a.)

A. The State Trial

Perkins stood on trial for Henderson's murder in the Genesee County Circuit Court. (Sixth Cir. Record 9/20/2010, Appx. 89-90, 556.) He presented evidence that Jones committed the murder and framed Perkins. As Perkins explained the sequence of events, at about 7:30 p.m., Perkins, Henderson, and Chanucy Vaughn, another friend, walked to a party. (JA 78-79.) At the party, Perkins sat at a basement bar and talked with Henderson and Vaughn. (*Id.* at 80-81.) At one point, Perkins joked with Henderson about having to "do you in," which both men laughed about. (*Id.*) As Vaughn testified, "[w]e all played with each other like that." (*Id.* at 40.)

Around 8:30 p.m., Perkins left to visit his girlfriend, Denise Hunter. (*Id.* at 83, 86-87.) Henderson and Jones joined Perkins. (*Id.* at 83.) Along the way, they stopped at the J&P, a convenience store. (*Id.* at 84.) After Perkins purchased wine for Jones, the men left the store. Perkins remembered, however, that he wanted to buy cigarettes, so he re-entered the store alone. (*Id.*) When he returned outside, Henderson and Jones were gone. (*Id.*)

Perkins continued walking to visit Hunter. On the way, he ran into a friend, Peter Junior. (*Id.* at 101-02.) Junior joined Perkins, and the two arrived to see Hunter around 9:20 p.m. (*Id.* at 86, 88, 102,

107-08.) An hour later, Perkins and Junior left together. (*Id.* at 88-89, 104-05.)

The two parted ways near the J&P. (*Id.*) Perkins saw Jones standing under a streetlight, with blood on his pants, shoes, and plaid coat. He was wearing black gloves. When Perkins asked what had happened, Jones said he had been in a fight. Jones appeared to be under the influence of alcohol. (*Id.* at 89-90.)

Perkins went to Vaughn's house, where Jones later arrived, wearing his plaid coat. Jones went straight to the basement, (Sixth Cir. Record 9/20/2010, Appx. 553), emerging in another jacket. (JA 90-91.)

Three days later, on March 7, 1993, Vaughn discovered Jones's plaid jacket in his basement, wedged between a locker and the wall. (*Id.* at 42-43, 46-48.) Vaughn turned the plaid jacket (with black gloves inside the pockets) over to the police. (*Id.* at 45; Sixth Cir. Record 9/20/2010, Appx. 603.) The crime lab determined that the jacket and gloves were soaked with blood. (Sixth Cir. Record 9/20/2010, Appx. 600-03.) Jones admitted that the blood was Henderson's, but claimed that the stains were due to an unrelated nose bleed. (*Id.* at 432, 457-59.)

Perkins testified that he and Henderson never fought. Their relationship was limited to "drink[ing] beer together, talk[ing] to girls, that was it." (JA 95.) Jones, on the other hand, had a motive to kill Henderson, as Jones and Henderson had previously been involved in a car theft, and rumors circulated that Henderson had snitched to the police. (*Id.* at 95-96; Sixth Cir. Record 9/20/2010, Appx. 484, 488.) Perkins

had nothing to do with the stolen car. (Sixth Cir. Record 9/20/2010, Appx. 468.)

At trial, the prosecution admitted that Jones was not "fooling anybody," but that he "just [did not] happen to be on trial." (*Id.* at 646-47.) According to the prosecutor, "nobody is sitting here telling you that Damarr Jones is totally innocent in this. I want you to know that. Nobody's foolish[.]" (JA 114.) Ultimately, the jury found Perkins guilty of first-degree murder. (Sixth Cir. Record 9/20/2010, Appx. 736.) On October 27, 1993, Perkins was sentenced to life in prison without the possibility of parole. (*Id.* at 754.)

B. The Direct Appeal

On appeal, Perkins, through appointed counsel, asserted that he was denied due process when: (1) the trial court failed to instruct the jury regarding the proper weight to be given to accomplice testimony; (2) the trial court improperly failed to give preliminary instructions to the jury; and (3) the prosecutor engaged in various forms of misconduct, including the destruction of Jones's blood-stained gloves. (Dist. Ct. Record 6-3, pp. 1-40.) Perkins raised the additional ground of ineffective assistance of counsel via a Supplemental Brief. (Dist. Ct. Record 6-4, pp. 4-6, 13-22.) Considering only the arguments raised by counsel, the Michigan Court of Appeals rejected them and affirmed Perkins's conviction. (Pet. App. 42a-46a.) The Michigan Supreme Court denied Perkins leave to appeal on January 31, 1997. (Pet. App. 41a.)

C. The State Post-Conviction Proceedings

On January 30, 1998, Perkins, acting *pro se*, filed a motion for relief from judgment under Michigan Court Rule 6.501, *et. seq.* (Dist. Ct. Record 8-3, pp. 18-20.) He again asserted that the trial court erred

by failing to instruct the jury regarding the proper weight of accomplice testimony. (*Id.* at 18-20, 30.) He also asserted that he was denied effective assistance of counsel because his attorney did not investigate evidence of his innocence. (*Id.*)

Perkins attached to his motion an affidavit from his sister, Ronda Hudson. (*See* Dist. Ct. Record 8, pp. 10, 13.) The affidavit, dated January 30, 1997, detailed a conversation between Hudson and Louis Ford in March 1993, the month Henderson was murdered. Ford, who occasionally socialized with Perkins, Jones, and Henderson, told Hudson that he had been at a house where Jones had been bragging about stabbing Henderson. Jones told Ford that he took his clothes to the cleaners and "laughed about it." (Pet. App. 54a-55a.) Ford refused to report this information to the police, but Hudson found a dry-cleaning clerk who remembered a man matching Jones's description entering her store with blood-covered clothing. (*Id.*)

Hudson shared Ford's information with Perkins before trial, and Perkins gave the information to his attorney. (*Id.*; Dist. Ct. Record 8, pp. 4-5.) But the attorney, who showed an utter "disregard for [Perkins] as a client," (JA 128), did not interview Ford, Hudson, or the dry-cleaning clerk. Nor did he call them at trial. (Dist. Ct. Record 8, pp. 4-5.) Instead, he merely asked Jones whether he had sent a pair of pants to the cleaners. Jones denied doing so. (JA 63-64.) The attorney also vaguely referenced Jones's trip to the cleaners when he cross examined witness Marvin Mays. (Sixth Cir. Record 9/20/2010, Appx. 307.) No other impeachment took place. (Dist. Ct. Record 6-2, pp. 16-17.)

While his motion was pending, on August 19, 1999, Perkins filed an amendment asserting that he was entitled to a new trial based on additional evidence. Attached to the motion was an affidavit from Demond Louis, Vaughn's brother, which Perkins obtained on March 16, 1999. (Dist. Ct. R. 8-3, pp. 21-23.) Louis, often referred to at trial as Mugsy, was on the prosecution's witness list. Perkins's attorney, however, did not interview Louis or call him to testify. (Sixth Cir. Record 9/20/2010, Appx. 459, 488; Dist. Ct. Record 6, p. 39; Dist. Ct. Record 6-2, pp. 17, 21.)

In his affidavit, Louis stated that Jones asked to speak to him around 11:00 p.m. on the night of the murder. (Pet. App. 50a.) Jones then "bragged, confessing . . . that he had just killed" Henderson. (*Id.*) Louis noticed that Jones had blood on his shoes and the front part of his pants. (*Id.*) Jones was wearing orange shoes, orange pants, and a matching colorful shirt. (*Id.*)

Early the next morning, Jones woke Louis and stated that he "had something he needed to do." (*Id.* at 51a.) Louis followed Jones into the basement and saw Jones place his orange shoes and pants from the night before into a paper bag. Both items were stained with blood. (*Id.*) The men walked to Pro-Clean Dry Cleaners. In the parking lot, Jones placed the shoes into the dumpster, explaining that he "couldn't get the stains out last night." (*Id.* at 51a-52a.) Jones left his orange pants with the dry cleaner. (*Id.* at 52a.)

On October 25, 2000, the state court denied Perkins's motion for relief from judgment. (Dist. Ct. Record 8-3, pp. 29-31.)

D. Perkins Attempts To Gather Additional Evidence And To Obtain Legal Assistance.

Following the denial of his state motion in late 2000 until his federal habeas filing in 2008, Perkins sought additional proof of innocence. He faced "numerous hurdles." (JA 123.) Perkins's education ended with a G.E.D., (Dist. Ct. Record 4, p. 1), he was in prison, and he was a "pro se litigant by necessity and lack of choice." (JA 123.) Nonetheless, Perkins sought additional support "to continue the pursuit of his actual innocence." (*Id.* at 125.)

First, with his sister's help, Perkins continued his efforts to locate the dry-cleaning clerk who received Jones's bloody clothes years earlier. Complicating matters was the fact that the clerk had retired. (JA 118.) Following "years of independent research," (JA 124), on July 16, 2002, Perkins and his sister obtained an affidavit from Linda Fleming, a retired clerk from Pro-Clean Dry Cleaners. According to Fleming, she was working on or around March 4, 1993, and was approached by a customer matching Jones's description. (Pet. App. 48a.) The customer wanted to know if Fleming could do anything to remove blood stains, and presented her with a pair of blood-stained orange pants. (*Id.*) The customer also presented a multi-colored cocktail shirt with large amounts of blood on the front bottom. (*Id.* at 48a-49a.) When Fleming asked about the blood, the customer stated he had been in a fight. (*Id.* at 49a.)

Next, Perkins had to re-acquire most of his legal records, which had been lost as a result of a flood and prison riot in 2001. (JA 124; Dist. Ct. Record 8-3, p. 11.) In 2004, Perkins repeatedly requested a copy of the police report associated with his case. (Dist. Ct.

Record 8-3, pp. 6-8, 10, 12, 13-17.) That year, Perkins also asked for records from the trial court. (*Id.* at pp. 9-10, 13-17.) In 2006, Perkins wrote to his trial attorney to secure records contained in his file. The attorney, no longer in private practice, did not maintain files for more than ten years. (*Id.* at 3.)

Perkins also sought legal "assistance to aid him in the filing of his habeas petition" in his effort to prove his innocence. (JA 124.) In 2001 and 2002, Perkins wrote several attorneys to secure counsel; none could help. (Dist. Ct. Record 8-3, pp. 33-35, 42-44, 46-47, 49-50.) He also contacted agencies that work with prisoners seeking to prove their innocence, but did not secure assistance. (*Id.* at 36, 45.) Without counsel, Perkins tried to prepare a legal case, but did not have access to a law library from 2001 to 2006. (*Id.* at 37-38.) And while he was approved to receive help from an in-prison legal writer in 2002 (*id.* at 41), in the years that followed the help was spotty at best. (*Id.* at 37-39, 62-68.)

In short, Perkins did not at any time "abdicate[] his quest to prove his innocence[.]" (JA 125.) Rather, he took repeated steps for preparing a thorough federal habeas petition.

E. The District Court's Decision

Ultimately, Perkins filed a *pro se* habeas petition with the United States District Court for the Western District of Michigan on June 13, 2008. (Dist. Ct. Record 1.) He filed an amended petition on August 29, 2008. (Dist. Ct. Records 6 through 6-5.) He asserted that he was entitled to habeas relief based on the same grounds asserted in his state proceedings, including his claim of ineffective assistance of counsel. (*See id.*)

Acknowledging that his conviction became final more than a year before his filing, Perkins asserted that his untimeliness should be excused because he is actually innocent. (Dist. Ct. Record 6-2, pp. 15-25.) He relied on the new evidence in the Hudson, Lewis, and Fleming affidavits. (Dist. Ct. Record 6, pp. 16-18; Dist. Ct. R. 6-2, pp. 5, 12.) Nevertheless, in the Report and Recommendation, the magistrate judge found that the petition was barred both by AEDPA's limitations period and by his lack of diligence. (Pet. App. 34a-40a.)

Perkins objected based on his showing of innocence, citing the affidavits as evidence not presented at trial, (JA 115-132), and asked the district court to excuse his untimeliness to avoid a "miscarriage of justice." (*Id.* at 126.) He explained that "he acted with reasonable diligence during the period he seeks to toll, to the best of his ability." (*Id.*) The district court found that Perkins was not entitled to relief because he had not been diligent. (Pet. App. 31a.) According to the district court, "[b]y July 2002, Petitioner had acquired all of the evidence that he recites to support his actual innocence, yet he waited until June 2008 to bring his claim before any court." (*Id.*) The court also found that Perkins's evidence of innocence was "substantially available to him at trial." (*Id.*) Acknowledging that the "precise contours of the affidavits may have been new as of 1997, 1999, and 2002," the court found that the evidence was not "new" because "one theory of the defense at trial was that Petitioner was being framed by the prosecution's lead witness [Jones], who himself was responsible for the murder." (*Id.*)

F. The Sixth Circuit's Reversal

After issuing a certificate of appealability asking whether "'reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling,'" (JA 133-136), the Sixth Circuit unanimously answered that question in the negative, reversing the district court and remanding to determine "whether Perkins asserts a credible claim of actual innocence." (Pet. App. 21a.)

Where a petitioner can satisfy the familiar *Schlup* standard, the Sixth Circuit reaffirmed that the petitioner may "pass through the [actual-innocence] gateway and argue the merits of his underlying constitutional claims.'" (Pet. App. 8a (quoting *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005)).) For this narrow range of cases, the court explained, diligence is not a prerequisite, "[g]iven the Supreme Court's rich jurisprudence protecting the rights of the wrongfully incarcerated" and the miscarriage of justice that could result from the imposition of procedural limits. Actual innocence, the court emphasized, distinguishes this case from those where petitioners seek relief "because of ineffective assistance of counsel, confusion of filing requirements, or other important, but less compelling reasons." (Pet. App. 21a.)

The Sixth Circuit characterized the miscarriage of justice exception as a type of equitable tolling based on its earlier precedent, but recognized that it may more properly be described as an equitable exception to help "distinguish[] among different standards for equitable relief." (Pet. App. 20a n.3); *see Rivas*, 687 F.3d at 547 n.42; *Lee*, 653 F.3d at 932 n.5 ("The more accurate characterization is 'equitable exception,' because equitable tolling involves different theoretical

underpinnings."). Perkins thus refers to it by its traditional name—the equitable "miscarriage of justice" exception.

SUMMARY OF ARGUMENT

I. Habeas corpus traditionally placed few limits on a federal court's review of constitutional claims on their merits. Neither res judicata nor a statute of limitations applied. Over time, the Court and Congress created stricter limits on pursuing habeas relief, balancing concerns for finality, comity, and federalism against the equitable flexibility necessary to ensure injustices were remedied. This evolution led to *both* general rules limiting the writ *and* exceptions to those rules permitting relief in exceptional cases.

This case involves one traditional exception—the "miscarriage of justice" exception. That exception permitted courts to consider procedurally barred claims if a petitioner could show that no reasonable juror would have convicted him in light of new evidence. If a petitioner could meet this standard, it permitted review of the petitioner's claims whether or not the petitioner had been diligent. The exception applied to nearly every type of procedural default, including "successive" petitions that contained previously rejected claims; "abusive" petitions that presented new claims that could have been presented earlier; the failure of a petitioner to develop evidence in state court; and the failure of a petitioner to follow proper procedure when presenting claims in state court, including the failure to file for state habeas relief within the state's statute of limitations.

II. AEDPA's 1-year limitations period incorporates the miscarriage of justice exception.

A. The reasons that *Holland* gave for applying equitable tolling to AEDPA's limitations period show that the statute includes the miscarriage of justice exception. *Holland* relied on the presumption that a non-jurisdictional limitations period, like AEDPA's, incorporates equitable tolling. This background presumption, moreover, does not apply simply to equitable tolling but includes other established equitable standards. Indeed, *Holland* itself noted that statutes are construed to retain courts' traditional equitable authority absent the clearest command.

The miscarriage of justice exception falls within this presumption. Before AEDPA, the exception was "well-defined in the case law" and "familiar to federal courts." The exception thus applies to the limitations period absent the clearest command. And the limitations period no more "clearly" rejects the miscarriage of justice exception than it does equitable tolling. If anything, this case is easier. For the "ultimate equity" on the petitioner's side is a colorable claim of innocence, not the facts necessary for equitable tolling.

B. This conclusion is confirmed by (1) AEDPA's structure; (2) the legal backdrop against which it was enacted; and (3) its general purposes.

1. When read as a whole, AEDPA illustrates that its limitations period incorporates the miscarriage of justice exception. That is because Congress expressly departed from the exception in two separate areas. For both second petitions and evidentiary hearings, Congress raised the exception's bar—requiring both clear-and-convincing evidence of innocence and due diligence. These two provisions show that had Congress sought to reject the exception for AEDPA's limitations period, it would have done so expressly. A

contrary interpretation would mean that Congress took the radical step of eliminating the exception from the limitations period—even for *first* petitions—while merely adjusting the exception for *second* petitions. But the Court has long treated the dismissal of the first petition as a "particularly serious matter."

2. Two principles predating AEDPA support this result. For one thing, the Court has long applied similar procedural bars in a consistent fashion. As such, it has held that courts may raise AEDPA's limitations period *sua sponte* because it would make "scant sense" to interpret the limitations period differently from other procedural thresholds. It would make equally scant sense to interpret AEDPA's limitation period to exclude the miscarriage of justice exception because the exception applies to these other procedural obstacles. For another, the Court has long "filled in the gaps" in the habeas statutes with equitable principles. This gap-filling role has led the Court to retain the exception despite changes to those statutes limiting the writ.

3. The miscarriage of justice exception comports with AEDPA's purposes. While AEDPA sought to eliminate delay, the exception does not defeat that goal given its demanding nature. AEDPA also sought to harmonize its new requirements with traditional principles, and the writ's central purpose reaches its zenith in the context of actual innocence. Further, without the exception, AEDPA's efficiency purposes could be undermined, because petitioners would be incentivized to file unripe actual-innocence claims before their investigations are complete. The exception also promotes federalism by giving the same respect to the federal statute of limitations that

is given to similar state statutes. Finally, that the Court has repeatedly applied the exception after AEDPA confirms that it comports with the statute.

III. The State's contrary arguments lack merit. *First*, *Holland* has already rejected the State's textual argument that equitable exceptions would render superfluous the limitation period's "carefully scripted scheme." As *Holland* noted, the statute's text contains *triggers* for the limitations period, saying nothing about *exceptions*.

Second, the State's concerns for gamesmanship—that petitioners will sit on their evidence until the State's case has deteriorated—are overblown. The exception will not incentivize such gamesmanship because it sets *demanding* standards and provides *limited* relief—so it would be irrational for petitioners to take the risks that the State suggests. The exception's standards, moreover, minimize such incentives because unexplained delay can be held against the petitioner when determining whether the petitioner has met the exception's standards.

Third, the State misreads history in arguing that there is no traditional rule allowing habeas petitioners to present constitutional claims without time limits. Historically, *all* habeas petitioners (not just those with actual-innocence evidence) could wait indefinitely, as no statute of limitations applied to constitutional claims in habeas. The State's cases, by contrast, address different claims—*freestanding* claims of innocence based *solely* on new evidence without *any* constitutional error.

Fourth, the State is wrong to argue that the exception includes a diligence component. Diligence was a component of a separate method for excusing

procedural default—establishing cause and prejudice. The miscarriage of justice exception, by contrast, comes into play only when a petitioner cannot establish cause. The Court has already made this clear by noting that AEDPA's standards for second petitions are more rigorous than the miscarriage of justice exception because they include a diligence component.

Fifth, the State fails adequately to distinguish this Court's cases recognizing the miscarriage of justice exception. It argues that the exception was an equitable exception to an equitable rule created by this Court. But the Court also applied it to limits created by Congress, and, regardless, statutes in equitable areas are interpreted to retain equitable standards.

Sixth, the State argues that Michigan provides two remedies for petitioners who can establish their innocence—the ability to file a motion for relief from judgment and clemency. But these additional state remedies for those with freestanding claims of innocence have never sufficed to bar the procedural use of that actual-innocence evidence to permit review of constitutional claims.

ARGUMENT

I. THE MISCARRIAGE OF JUSTICE EXCEPTION HAS LONG ACTED AS A "GATEWAY" ELIMINATING PROCEDURAL OBSTACLES TO A FEDERAL COURT'S REVIEW OF A HABEAS PETITION ON ITS MERITS

A. Statutory And Judicial Limits On the Writ Evolved With Time And Habeas Practice

"[H]abeas corpus is, at its core, an equitable remedy." *Schlup*, 513 U.S. at 319. Thus, the "history of

the Great Writ of Habeas Corpus reveals" that federal courts traditionally applied "comparatively simple rules" when resolving habeas petitions, rules that did not impose many procedural limits to the resolution of the petition on its merits. *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996); *Hensley v. Mun. Ct.*, 411 U.S. 345, 350 (1973) (noting "demand for speed, flexibility, and simplicity"). For instance, unlike in most legal areas, "the denial by a court or judge of an application for habeas corpus was not res judicata," meaning that a "'person detained in custody might thus proceed from court to court until he obtained his liberty.'" *Sanders v. United States*, 373 U.S. 1, 7 (1963) (citation omitted). Similarly, federal courts had broad discretion to "receive evidence and try the facts anew." *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). There was also "no statute of limitations," and the "doctrine of laches [was] inapplicable." *Heflin v. United States*, 358 U.S. 415, 420 (1959) (Stewart, J., concurring). In short, the writ "cut through barriers of form and procedural mazes" to "reach all manner of illegal detention." *Harris*, 394 U.S. at 290.

Gradually, "Congress, the [Habeas] Rule writers, and the courts . . . developed more complex procedural principles" for habeas petitions. *Lonchar*, 517 U.S. at 322. Congress adopted stricter statutes and rules. *See McCleskey*, 499 U.S. at 483-88. The Court, for its part, attempted to fill "gaps in the habeas statute[s]" with equitable principles that balanced the competing demands in this area. *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) (citing examples). Habeas limits have thus resulted from an "interplay between statu-

tory language and judicially managed equitable considerations." *Schlup*, 513 U.S. at 318 n.35.

These limits reflected a recognition that numerous "filings by individual petitioners might adversely affect the administration of justice" and "pose[] a threat to the finality of state-court judgments and to principles of comity and federalism." *Schlup*, 513 U.S. at 318; *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring in the result) (noting that "floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts"). The limits reflected the further reality that the writ's scope had expanded to reach claims alleging not only a lack of jurisdiction in the convicting court, but also all types of constitutional error. *See McCleskey*, 499 U.S. at 478-79.

Weighed against these practical concerns was the need "to maintain the courts' freedom to issue the writ, aptly described as the 'highest safeguard of liberty.'" *Lonchar*, 517 U.S. at 322 (citation omitted). Accordingly, these limits evolved in a manner that "balance[d] the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324. Along with the limits thus came exceptions designed to protect against the risk, aptly described by Justice Jackson, of "'prejudice [to] the occasional meritorious application [by] be[ing] buried in a flood of worthless ones.'" *McCleskey*, 499 U.S. at 492 (quoting *Brown*, 344 U.S. at 537 (Jackson, J., concurring in the result)); *see Engle v. Isaac*, 456 U.S. 107, 135 (1982) ("In appropriate cases th[e] principles [of comity and finality] must yield to the imperative of correcting a fundamentally unjust incarceration.").

B. Habeas Courts Have Long Recognized The Miscarriage Of Justice Exception

Today's case involves one traditional exception to procedural limits on the writ—the "fundamental miscarriage of justice exception." *Herrera*, 506 U.S. at 404. That exception has long been "'[w]ell defined in the case law,' and 'familiar to federal courts.'" *Calderon*, 523 U.S. at 559 (quoting *McCleskey*, 499 U.S. at 496). It "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*, 506 U.S. at 404.

Under the exception, a court would consider a procedurally barred constitutional claim if a petitioner with new evidence could "show that it [was] more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327; *see Murray*, 477 U.S. at 496 (finding exception applies where "a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (plurality op.) (finding exception applies for "a colorable claim of factual innocence"). This showing sufficed, "standing alone," to permit review of constitutional claims even if the petitioner had not been diligent. *See Withrow*, 507 U.S. at 700 (O'Connor, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.).

The exception's settled acceptance reflects its proper balancing of the competing interests underlying the evolving habeas standards. On the one hand, the exception respected the interests in finality, comity, and conservation of resources, because "habeas corpus petitions that advance a substantial claim of

actual innocence are extremely rare." *Schlup*, 513 U.S. at 321. On the other, the exception furthered the writ's central purpose by "serv[ing] as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.'" *McCleskey*, 499 U.S. at 495 (citation omitted).

Before AEDPA, therefore, the Court repeatedly held that the exception applied to claims that were not properly presented to state courts (state defaults), and claims that were not properly presented to federal courts (federal defaults). Indeed, avoiding a miscarriage of justice has been "a unifying theme to this Court's habeas jurisprudence," with "the possibility that an error may have caused the conviction of an actually innocent person [being] sufficient by itself to permit plenary review . . . ." *Brecht*, 507 U.S. at 652 (O'Connor, J., dissenting). With respect to a statute of limitations specifically, it bears noting that "because there was no statute of limitations governing the filing of habeas-corpus petitions prior to AEDPA, there was likewise no occasion to apply the [exception] to excuse untimely filed petitions." *Rivas*, 687 F.3d at 547. Yet in every other context where the courts, Congress, or the states imposed procedural limits, the Court recognized the exception to those limits for miscarriages of justice—specifically, the imprisonment of one who credibly asserts innocence:

Successive Petitions. Based on statutorily imposed limits, the Court had held that courts were barred from considering "successive" petitions—those re-raising claims already rejected in federal court. *See Kuhlmann*, 477 U.S. at 449-52 (plurality op.). Relying on an article by Judge Friendly, however, the Court applied the miscarriage of justice exception to

this general rule, holding that courts should allow successive petitions if "the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at 454 (discussing Friendly, 38 U. Chi. L. Rev. 142).

Abusive Petitions. The Court had gradually placed stricter limits on "abusive" petitions—those raising new claims in a second petition that could have been raised in the first. *See Schlup*, 513 U.S. at 319 n.34. Ultimately, the Court held that courts could not consider these petitions unless a petitioner could show both "cause" for the failure to raise the claimed constitutional error earlier and "prejudice" from the error. *McCleskey*, 499 U.S. at 494. The Court again held, however, that even if a "petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." *Id.* at 494-95.

Failure To Develop Facts In State Court. Similarly, the Court progressively placed stricter limits on the ability of petitioners to obtain federal hearings to supplement their constitutional claims. *See Keeney*, 504 U.S. at 4-7. It settled on the same "cause and prejudice" standard for evidentiary hearings when a petitioner failed diligently to develop facts in state court. *See id.* at 8. But again, the Court "adopt[ed] the narrow exception to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result . . . ." *Id.* at 11-12.

State Procedural Default. In a similar vein, the Court's jurisprudence evolved to apply stricter standards governing federal review of constitutional claims that state courts had rejected for failing to follow state procedure. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). As in other contexts, the Court ultimately required petitioners to show cause and prejudice for federal review of such claims. *See Coleman*, 501 U.S. at 750. Nevertheless, the Court retained the miscarriage of justice exception in this context too, noting "that 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." *Murray*, 477 U.S. at 496; *see Coleman*, 501 U.S. at 750; *Smith v. Murray*, 477 U.S. 527, 537-38 (1986).

A variety of state defaults thus could be disregarded by a proper showing of innocence, including the failure to raise a claim on appeal, *see Murray*, 477 U.S. at 495; the failure to timely object under a contemporaneous-objection rule, *see Wainwright*, 433 U.S. at 87, and, particularly relevant here, the failure to timely file a petition or appeal, *see Coleman*, 501 U.S. at 750. In other words, "many states enforced their own statutes of limitations in their collateral review procedures . . . and the Supreme Court had held that a procedural default based on a failure to timely file for post-conviction relief in state court could be excused if the 'failure to consider the claims will result in a fundamental miscarriage of justice.'" *Rivas*, 687 F.3d at 550 (citation omitted). Indeed, numerous cases recognized that a credible claim of innocence could overcome the failure timely to file for

state post-conviction relief. *See, e.g., Morrow v. Thompson*, No. 96-35108, 1996 WL 740893, at *1 (9th Cir. Dec. 20, 1996); *Cokley v. Emery*, No. 96-1130, 1996 WL 718126, at *1 (10th Cir. Dec. 13, 1996); *Morales v. Calderon*, 85 F.3d 1387, 1389 (9th Cir. 1996); *Higgason v. Clark*, 984 F.2d 203, 206 (7th Cir. 1993); *Alexander v. Black*, No. 92-7320, 1993 WL 81855, at *2 (5th Cir. Mar. 8, 1993); *Gordon v. Nagle*, 2 F.3d 385, 388 (11th Cir. 1993); *Henderson v. Cohn*, 919 F.2d 1270, 1273 (7th Cir. 1990); *Whiddon v. Dugger*, 894 F.2d 1266, 1267-68 & n.2 (11th Cir. 1990).

Former Rule 9(a). In 1976, a "laches" doctrine was codified permitting a petition to be "dismissed if it appear[ed] that the state . . . ha[d] been prejudiced in its ability to respond to the petition by delay," and the petitioner could not show that the petition was "based on grounds of which he could not have had knowledge by the exercise of reasonable diligence." Rule 9(a) of the Rules Governing Section 2254 Cases, 28 U.S.C.A. fol. § 2254 (West 1994). Here again, courts recognized that the miscarriage of justice exception would overcome Rule 9(a). *See Spalding v. Aiken*, 460 U.S. 1093, 1097-98 (1983) (Burger, C.J., statement concerning denial of certiorari) (noting that exceptions to Rule 9(a) should include cases where petitioner can make "colorable claim of innocence"); *see also United States v. Stifel*, 594 F. Supp. 1525, 1539 n.13 (N.D. Ohio 1984) (rejecting Rule 9(a) argument because "defendant has presented a colorable claim of innocence"); 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 24.2(c), at 1286 (6th ed. 2011) (noting that under former Rule 9(a), "situations might arise—a 'manifest miscarriage of justice' or 'a colorable showing of inno-

cence,' for example—in which other recognized habeas corpus exceptions might excuse prejudicial delay").

Non-Constitutional Error. Finally, in the federal habeas context, the Court had held that habeas review was unavailable to correct non-constitutional errors. *See United States v. Addonizio*, 442 U.S. 178, 185 (1979). But the Court consistently excepted from this rule errors that "constituted 'a fundamental defect which inherently result[ed] in a complete miscarriage of justice.'" *Id.* (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). And it found this exception met if an error resulted in a conviction "for an act that the law does not make criminal," i.e., where the petitioner was actually innocent. *Davis v. United States*, 417 U.S. 333, 346 (1974); *see Bousley v. United States*, 523 U.S. 614, 620 (1998).

In sum, before AEDPA, the Court had "consistently reaffirmed the existence and importance of the exception for fundamental miscarriages of justice" to procedural limits on constitutional claims in a federal habeas petition. *Schlup*, 513 U.S. at 321.

II. AEDPA'S LIMITATIONS PERIOD INCORPORATES THE MISCARRIAGE OF JUSTICE EXCEPTION

AEDPA adopts a 1-year limitations period for petitions challenging state convictions. 28 U.S.C. § 2244(d)(1). This period is triggered by the latest of four dates: (A) "the date on which the judgment became final"; (B) the date on which any illegal state "impediment" to the filing of the petition was removed; (C) the date on which the Court recognizes a new and retroactive constitutional right; 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.* § 2244(d)(1). The statute expressly tolls this period during the time that "a properly filed application for State post-conviction" relief is pending in state court. *Id.* § 2244(d)(2).

The statute is silent, however, on whether Congress meant to incorporate traditional equitable exceptions, such as equitable tolling or the miscarriage of justice exception. In *Holland*, the Court held that AEDPA's limitations period incorporated equitable tolling. 130 S. Ct. at 2560-62. Here, the Court should likewise hold that the statute incorporates the miscarriage of justice exception. *Holland* supports that result. *See infra* Part II.A. So too do AEDPA's structure, the legal backdrop against which it was enacted, and its purposes. *See infra* Part II.B.

A. *Holland* Illustrates That AEDPA's Limitations Period Incorporates The Miscarriage Of Justice Exception

All of the reasons *Holland* gave for recognizing equitable tolling under § 2244(d)(1) confirm that this limitations period incorporates the miscarriage of justice exception.

1. As *Holland* noted, AEDPA's limitations period is not jurisdictional, so the principle that courts have "no authority to create equitable exceptions" to jurisdictional commands does not apply here. *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *see Holland*, 130 S. Ct. at 2560. Rather, the opposite presumption governs: a "nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland*, 130 S. Ct. at 2560 (quoting *Irwin v. Dep't of Veterans Af-*

fairs, 498 U.S. 89, 95-96 (1990)); *see Young v. United States*, 535 U.S. 43, 49 (2002) (citing cases).

This presumption, moreover, is not limited to the specific equitable-tolling test that *Holland* adopted. Instead, it reaches well-established equitable standards. For example, after ruling that Title VII's timely filing requirement was not jurisdictional, the Court held that it was subject *both* to equitable tolling *and* to waiver and estoppel. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *see also, e.g.*, *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985) (noting that "[s]tatutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling"); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 233-35 (1959) (interpreting federal statute of limitations to include estoppel defense). Likewise, "[f]raudulent concealment is an 'equitable doctrine . . . read into every federal statute of limitation.'" *Go Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 178 (4th Cir. 2007) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)).

Holland itself recognized that this presumption applies more broadly than to equitable tolling. As the Court indicated, in areas where "equitable principles have traditionally governed," it has refused to "construe a statute to displace courts' *traditional equitable authority* absent the clearest command." 130 S. Ct. at 2560 (emphasis added; internal citations and quotation marks omitted). As *Holland* also noted, *see id.*, the Court has repeatedly "reaffirmed that 'habeas corpus has traditionally been regarded as governed by equitable principles,'" *Kuhlmann*, 477 U.S. at 447 (plurality op.) (citation omitted); *cf. Young*, 535 U.S. at 50 (finding background presump-

tion particularly appropriate for bankruptcy laws, because bankruptcy courts "are courts of equity"). *Holland* found that this equitable tradition "counsel[ed] hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." 130 S. Ct. at 2562.

In sum, as Judge Cabranes noted, the background presumption relied on in "*Holland* is not limited to equitable tolling," but reaches other traditional equitable claims. *Rivas*, 687 F.3d at 549.

2. The miscarriage of justice exception falls within this presumption. Before AEDPA, that exception was a well-established defense to many procedural defaults. *See supra* Part I. It was "'[w]ell defined in the case law'" and "'familiar to federal courts.'" *Calderon*, 523 U.S. at 539 (quoting *McCleskey*, 499 U.S. at 496); *see Schlup*, 513 U.S. at 320; *Herrera*, 506 U.S. at 404; *Keeney*, 504 U.S. at 11-12; *Coleman*, 501 U.S. at 750; *McCleskey*, 499 U.S. at 494-495; *Kuhlmann*, 477 U.S. at 454 (plurality op.); *Murray*, 477 U.S. at 496; *Smith*, 477 U.S. at 537; *Davis*, 417 U.S. at 346. Indeed, the exception's pedigree led Justice O'Connor to state that "this Court continuously has recognized that the ultimate equity on the prisoner's side—a sufficient showing of actual innocence—is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim." *Withrow*, 507 U.S. at 700. As this settled line of cases reflects, "absent the clearest command," AEDPA's limitations period incorporates this equitable principle. *Holland*, 130 S. Ct. at 2560 (internal quotation marks omitted).

No such clear command exists. Just as AEDPA's limitations period lacks unambiguous clarity to show congressional intent to reject equitable tolling, *see id.* at 2560-61, it likewise lacks unambiguous clarity to show a congressional rejection of the miscarriage of justice exception. Rather, "AEDPA's 1-year limit reads like an ordinary, run-of-the-mill statute of limitations" that incorporates traditional equitable defenses like equitable tolling, estoppel, and, in habeas, the miscarriage of justice exception. *Id.* at 2561.

If anything, today's case is easier than *Holland*. Notably, AEDPA's limitation period does expressly include one type of tolling—when a state post-conviction petition is pending in state court, *see* 28 U.S.C. § 2244(d)(2). By negative implication, the inclusion of that tolling provision could suggest that Congress did not mean to include other types of tolling (such as equitable tolling). *But see* 130 S. Ct. at 2562 (rejecting "the interpretive maxim *inclusio unius est exclusio alterius*"). AEDPA's limitations period, by contrast, makes no reference to an exception for other kinds of "miscarriages of justice." *Holland*, moreover, concerned an exception based on misconduct by the petitioner's attorney. *See id.* at 2564-65. Today's case, by contrast, concerns an exception for innocence. Surely "the 'evils of archaic rigidity'" that *Holland* described as resulting from "absolute legal rules," *id.* at 2563 (citation omitted), are far more severe when such rigidity could compel a factually innocent man to remain in prison for life—or, even worse, be put to death.

It should come as no surprise, therefore, that, after *Holland*, the five circuits (Second, Sixth, Ninth, Tenth and Eleventh) to consider the issue have found

that AEDPA's limitations period incorporates the exception. (Pet. App. 8a-20a); *see Rivas*, 687 F.3d at 547-52; *Lee*, 653 F.3d at 932-36; *San Martin*, 633 F.3d at 1267-68; *Lopez*, 628 F.3d at 1231. One other circuit, the Fifth, has suggested after *Holland* that no exception exists. *See Henderson v. Thaler*, 626 F.3d 773, 781 (5th Cir. 2010). But, as the Sixth Circuit noted, Pet. App. 12a n.1, that case addressed a different question—whether an equitable exception existed for a claim of innocence of the death penalty, not an assertion (like the one at issue here) of factual innocence of the crime. *Henderson*, 626 F.3d at 781.

B. Additional Considerations Confirm That AEDPA's Limitations Period Incorporates The Miscarriage Of Justice Exception

In addition to *Holland*, general principles prove that AEDPA's limitations period incorporates the miscarriage of justice exception. In particular, that interpretation is confirmed by (1) AEDPA's structure; (2) the legal backdrop against which it was enacted; and (3) its general purposes.

1. AEDPA's structure shows that Congress knows how to depart from the miscarriage of justice exception

AEDPA—when read "as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)—shows that the miscarriage of justice exception applies to its limitations period. As the Court has explained, *House*, 547 U.S. at 539, AEDPA did, in fact, depart from that exception in two legal areas where this Court had traditionally applied it. That "'Congress knows how to' restrict the traditional [exception] 'when it wants to,'" *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 417 (2009) (quoting *Omni Capital Int'l, Ltd. v. Rudolf*

Wolff & Co., 484 U.S. 97, 106 (1987)), proves that it did not intend to do so for the limitations period.

As explained, before 1996, the Court had applied the exception to require federal courts to consider an "abusive" petition. *McCleskey*, 499 U.S. at 494. AEDPA, by contrast, establishes a higher standard for those successive petitions. Petitioners must *both* meet a higher "clear and convincing evidence" standard of innocence *and* satisfy a diligence requirement. 28 U.S.C. § 2244(b)(2)(B)(i)-(ii).

Likewise, before 1996 in both the first and second habeas settings, the Court had applied the exception to permit petitioners to obtain evidentiary hearings that would have been barred for failure diligently to develop the facts in state court. *See Keeney*, 504 U.S. at 11. In AEDPA, however, Congress again "raised the bar" for such hearings. *Williams v. Taylor*, 529 U.S. 420, 433 (2000). It established the same requirements for evidentiary hearings—clear-and-convincing evidence of innocence and due diligence—that it established for abusive petitions, "eliminating [the] freestanding 'miscarriage of justice' exception." *Id.*; 28 U.S.C. § 2254(e)(2).

These provisions demonstrate Congress's detailed attention to, and ability to amend, the miscarriage of justice exception through AEDPA. It also reveals Congress's intent to leave the exception in place for untimely petitions. Neither provision "addresses the type of petition at issue here—a first federal habeas petition seeking consideration of [untimely] claims based on a showing of actual innocence." *House*, 547 U.S. at 539. Instead, Congress was silent on whether the exception would apply to such petitions. These other provisions show, however, that, had Congress

sought to prohibit courts from incorporating the exception into AEDPA's limitations period, it would have done so expressly, as it did elsewhere. *Cf. Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms").

This interpretation of silence comports with the traditional canon that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Nken v. Holder*, 556 U.S. 418, 430 (2009) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987)) (refusing to interpret law as departing from traditional equitable standard governing stays). That Congress did not "raise[] the bar" for AEDPA's limitations period shows that, just as with equitable tolling, it meant for established rules to apply. *Williams*, 529 U.S. at 433; *see House*, 547 U.S. at 539 (refusing to extend more stringent AEDPA provisions to other procedural defaults). Put another way, the "more stringent actual innocence exception for successive petitions and evidentiary hearings," combined with the absence of more stringent standards for § 2244(d)(1), "suggests that Congress intended not to alter the existing jurisprudential framework." *Lee*, 653 F.3d at 937; *Souter*, 395 F.3d at 599.

Given this structure, moreover, the contrary interpretation would be "'seemingly perverse.'" *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007) (citation omitted). It would mean that Congress took the radical step of eliminating the exception from the limita-

tions period—even for *first* petitions—while merely adjusting the exception for second petitions. That makes little sense. After all, it is the "[d]ismissal of a *first* [federal] habeas petition," not the second, that "is [the] particularly serious matter." *Lonchar*, 517 U.S. at 324; *House*, 547 U.S. at 539. Such an odd incongruity should not be grounded in silence alone. *See Rivas*, 687 F.3d at 550 ("'[I]t is difficult to imagine that a Congress that explicitly allowed maintenance of a second or successive petition where the applicant makes out a strong claim of actual innocence implicitly intended to foreclose as untimely an initial petition brought by the individual with a comparable claim.'" (citation omitted)); *cf. Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998) (rejecting interpretation that "would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review").

2. The legal principles against which Congress enacted AEDPA show that the miscarriage of justice exception applies to its limitations period

That § 2244(d)(1) incorporates the miscarriage of justice exception is supported by the assumption "that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1795 (2010); *see North Star Steel Co. v. Thomas,* 515 U.S. 29, 34 (1995) ("'[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them'" (citation omitted)). Settled principles confirm that Congress

would not have departed from the miscarriage of justice exception through statutory silence.

a. The Court treats analogous procedural obstacles consistently

Before AEDPA, the Court had attempted to "advance[] uniformity in the law of habeas corpus" by interpreting and applying similar procedural obstacles to full habeas review in a similar fashion. *Keeney*, 504 U.S. at 10. The Court, for example, adopted the cause-and-prejudice standard for federal abusive petitions precisely because that standard governed state defaults. *McCleskey*, 499 U.S. at 496 (noting "the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ"); *see Keeney*, 504 U.S. at 6-10 (extending cause-and-prejudice standard to federal evidentiary hearings for same reasons). Congress, it should be presumed, was aware of these efforts to administer similar procedural rules in a consistent manner. *Merck*, 130 S. Ct. at 1795.

Indeed, the Court has already applied this very presumption when interpreting AEDPA's limitations period—presuming that threshold procedural obstacles to habeas review should be applied in a consistent manner. In *Day*, the Court interpreted the limitations period to give federal courts discretion to consider the timeliness of habeas petitions on their own initiative. 547 U.S. at 209. The Court did so because of the established law (preexisting AEDPA) that courts could *sua sponte* consider threshold obstacles to review. *Id.* at 206-09. And the Court found that it "would make 'scant sense' to treat AEDPA's statute of limitations differently from [these] other threshold constraints on federal habeas petitioners."

Wood, 132 S. Ct. at 1833 (quoting *Day*, 547 U.S. at 209).

Day confirms that AEDPA's limitations period includes the miscarriage of justice exception. As described in Part I, before 1996, federal courts had applied the exception to many threshold obstacles to habeas review, including both procedural defaults in state court and defaults that occurred because the petitioner failed properly to present claims on federal habeas. It would make "'scant sense' to treat AEDPA's statute of limitations differently" from these threshold constraints for the miscarriage of justice exception as well. *Wood*, 132 S. Ct. at 1833 (citation omitted). That would mean, on the one hand, that a federal court could review federal claims if the petitioner presented compelling evidence of actual innocence, even though state courts had rejected the same claims under the state's statute of limitations. *See, e.g.*, *Coleman*, 501 U.S. at 750 (noting that exception would apply to claims rejected in state court on timeliness grounds). If, on the other hand, a petitioner with the exact same claims and the exact same evidence properly exhausted his claims in state court but failed to file a timely federal petition, the federal court would be barred from considering those claims. Absent express language to the contrary, the Court should avoid an interpretation that would lead to such inequitable inconsistencies between petitioners. *See Panetti*, 551 U.S. at 945 (noting that "the practical effects of [the Court's] holdings[] should be considered when interpreting AEDPA").

If anything, the legal principle that procedural constraints should be interpreted and administered in a similar fashion applies more forcefully in this

case than it did in *Day*. There, the Court's holding that courts could raise AEDPA's statute-of-limitations defense on their own initiative *conflicted* with the presumption that statutes of limitations can be forfeited. *See* 547 U.S. at 212 (Scalia, J., dissenting); Fed. R. Civ. P. 8(c)(1). Here, by contrast, treating AEDPA's limitations period in harmony with other threshold obstacles to federal review *reinforces* the presumption that statutes do not "displace courts' traditional equitable authority absent the clearest command." *Holland*, 130 S. Ct. at 2560 (internal citations and quotation marks omitted).

b. The Court "fills the gaps" of the habeas statutes

Before AEDPA, moreover, "[t]his Court ha[d] repeatedly noted the interplay between statutory language and judicially managed equitable considerations" when interpreting habeas statutes. *Schlup*, 513 U.S. at 318 n.35; *O'Neal*, 513 U.S. at 445. The Court's historical practice of "filling in gaps" in the habeas statutes confirms that if Congress had intended to displace one such "gap filler" (the miscarriage of justice exception), it would have done so in unmistakable terms. Indeed, the exception's very history illustrates the Court's refusal to eliminate it absent an *explicit* command to that effect.

The exception grew out of language from a 1948 statute indicating that a federal court need not entertain a "successive" petition if it was satisfied that "'the ends of justice will not be served by such inquiry.'" *Sanders*, 373 U.S. at 11 n.5 (quoting 28 U.S.C. § 2244). Since then, the Court has consistently interpreted habeas statutes as retaining this "equitable inquiry required by the ends of justice," so long

as no explicit language prohibited that inquiry. *Schlup*, 513 U.S. at 320. The 1948 version of § 2255, for example, "appeared to announce a much stricter abuse-of-the-writ standard than its counterpart in § 2244," but the Court held that "the language in § 2255 'cannot be taken literally,' and construed it to be the 'material equivalent'" of § 2244, thereby retaining its "ends of justice" standard. *McCleskey*, 499 U.S. at 484 (quoting *Sanders*, 373 U.S. at 13-14).

Subsequently, in 1966, Congress amended the habeas statutes "to introduce 'a greater degree of finality of judgments.'" *Kuhlmann*, 477 U.S. at 450 (plurality op.) (citation omitted). The amendments distinguished between petitions filed by federal and state prisoners, deleting the reference to the "ends of justice" for successive petitions by state prisoners. *Id.* at 449. Nevertheless, the Court rejected the argument that "federal courts no longer must consider the 'ends of justice' before dismissing a successive petition" by a state prisoner, *id.* at 451, finding that the "'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence," *id.* at 454 (citing Friendly, 38 U. Chi. L. Rev. at 160).

Ten years later, in 1976, Congress adopted a laches rule with former Habeas Rule 9(a). *See* 2 *Federal Habeas Corpus Practice* § 24. Here again, courts suggested that the rule should be interpreted to allow delayed claims to proceed on a showing of innocence. *Spalding*, 460 U.S. at 1094 (Burger, C.J., statement concerning the denial of certiorari); *see* 2 *Federal Habeas Corpus Practice* § 24.2[c], at 1286.

In short, before AEDPA, federal courts had interpreted habeas statutes as leaving room for judicial consideration of the "ends of justice" when determining whether federal or state procedural defaults should apply. That Congress was aware of this line of authority when enacting AEDPA, *see Merck*, 130 S. Ct. at 1795, confirms that, had it sought to prohibit courts from applying the miscarriage of justice exception to AEDPA's limitations period, it would have done so expressly.

3. The miscarriage of justice exception comports with AEDPA's purposes

The miscarriage of justice exception "comports with the values and purposes underlying AEDPA." *Calderon*, 523 U.S. at 558. To be sure, AEDPA's limitations period "seeks to eliminate delays in the federal habeas review process." *Holland*, 130 S. Ct. at 2562. But the exception has been carefully designed so as not to defeat that goal. It "is demanding and permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327). As such, an exception for this "narrow class of cases" will not undermine the finality purposes of AEDPA's limitations period anymore than it has undermined the finality purposes of the other procedural rules to which it has applied. *McCleskey*, 499 U.S. at 494. If anything, *Holland*'s equitable-tolling test will apply far more frequently. *Schlup*, 513 U.S. at 324 ("[E]xperience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.").

AEDPA, moreover, "did not seek to end every possible delay at all costs" or "undermin[e] basic habeas corpus principles," but instead sought to "harmonize

the new statute with prior law, under which a petition's timeliness was always determined under equitable principles." *Holland*, 130 S. Ct. at 2562. Thus, "[w]hen Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)). And the central purpose of habeas corpus—protecting individual liberty—reaches its zenith when the petitioner may be innocent. *Schlup*, 513 U.S. at 325 (noting that the "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system"); *see McCleskey*, 499 U.S. at 495.

In addition, the conclusion that AEDPA's limitations period does not incorporate the miscarriage of justice exception could hinder "judicial efficiency and conservation of judicial resources." *Day*, 547 U.S. at 205. After all, barring any consideration of late-filed actual-innocence claims would only incentivize habeas petitioners to file federal petitions within a year of *each and every* new piece of evidence, *see* 28 U.S.C. § 2244(d)(1)(D), even if the investigations into their innocence are not yet complete and the actual-innocence claims not yet ripe. In that respect, it should be noted that gathering actual-innocence evidence takes substantial time and resources. *See* Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 126 (2008) ("Locating an alibi witness, obtaining experts to challenge forensic evidence or undermine eyewitness identifications, or presenting evidence of defendants' lack of capacity requires substantial resources and time."). In the context of *Ford*-based incompetency claims, the Court has recognized that

"[i]nstructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources, reduce piecemeal litigation, or streamline federal habeas proceedings." *Panetti*, 551 U.S. at 946 (internal quotation marks and alterations omitted). The same is undoubtedly true for unripe actual-innocence gateway claims.

Incorporating the miscarriage of justice exception into AEDPA's limitations period also comports with federalism principles. One such principle is comity, which the Court has honored by attempting to eliminate "inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own." *Coleman*, 501 U.S. at 751. But eliminating the exception from AEDPA's limitation period would do the opposite. It would grant greater respect to a federal statute than is granted to a state statute, since a federal court may apply the exception to consider claims defaulted in state court under state timeliness rules. *See id.* at 750. It would be odd to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of *federal* procedural rules than with the procedural rules established and enforced by the *states*. If anything, the federal statute of limitations should be interpreted less strictly than similar state rules. *See Holland*, 130 S. Ct. at 2563 (rejecting strict standard applied to state procedural defaults that criminal defendants bear the risk of attorney errors when applying equitable tolling to AEDPA's limitations period).

Confirming that the exception comports with AEDPA, the Court has repeatedly applied it after the statute's enactment. *See House*, 547 U.S. at 536-54;

Bousley, 523 U.S. at 622-24; *Calderon*, 523 U.S. at 558. In *Calderon*, the Court adopted the exception for determining when a federal court may recall its mandate to revisit the merits of an earlier decision. 523 U.S. at 558 (noting that the "miscarriage of justice standard is altogether consistent . . . with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence"). In *House*, the Court relied on the standard to overcome a petitioner's procedural default in state court. 547 U.S. at 538. And in *Bousley*, a federal case under § 2255, the Court found that the standard, if met, could be used to overcome a failure to raise a claim on direct federal appeal. 523 U.S. at 622. The exception is equally applicable in this habeas setting.

The constitutional-avoidance canon supports this reading. As courts have recognized, "denying federal habeas relief from an actually innocent [prisoner] would be 'constitutionally problematic.'" *Lee*, 653 F.3d at 936 (quoting *Souter*, 395 F.3d at 601-02 and citing the Suspension Clause); *see Rivas*, 687 F.3d at 552 (describing this possibility as raising a "thorny constitutional issue"). In *Herrera,* the Court assumed, "for the sake of argument," that a capital petitioner with a "truly persuasive demonstration of 'actual innocence' made after trial would render the execution" of the petitioner "unconstitutional." *Herrera*, 506 U.S. at 417. Here, Perkins not only maintains his actual innocence, but also asserts constitutional violations at the trial resulting in his conviction, raising even deeper constitutional concerns. Allowing actually innocent prisoners access to habeas relief via the *Schlup* gateway thus stays "within AEDPA's framework, without necessitating the more

delicate task of determining whether § 2244(d) itself violates the Constitution when applied to deny review to a first-time petitioner raising a credible and compelling [assertion] of actual innocence along with claims of constitutional error." *Rivas*, 687 F.3d at 552.

III. THE STATE'S ARGUMENTS LACK MERIT

The State's arguments to the contrary do not require a different conclusion.

A. *Holland* Has Already Rejected The State's Textual Arguments

The State begins with § 2244(d)'s text. It argues that the statute "establishes a detailed system for determining when AEDPA's one-year limitations period begins to run" and that the miscarriage of justice exception would "render[] superfluous this carefully scripted scheme." Br. of Pet'r 17-18. This argument should look familiar. After all, in *Holland* the state argued the same thing. *See* Br. of Resp. at 26-27, *Holland v. Florida*, 130 S. Ct. 2549 (2010) (No. 09-5327), 2010 WL 304276. But the State's rationale—the rationale of those pre-*Holland* decisions that refused to incorporate the miscarriage of justice exception, *see, e.g.*, *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) (noting that § 2244(d)(1) defines "its one-year limitations period in detail and adopts very specific exceptions")—was expressly rejected by *Holland*. *See* 130 S. Ct. at 2561. There, the Court pointed out that § 2244(d)(1)'s detailed provisions "relat[e] to the events that *trigger* its running," and are not "'explicit exceptions to its basic time limits.'" *Id.* (citation omitted). Inclusion of these *triggers*, it followed, did not suffice to show that Congress intended for the

courts to reject traditional *exceptions* to statutes of limitations like equitable tolling. *See id.*

The same textual analysis applies here. Indeed, the appellate courts have consistently noted that *Holland's* textual interpretation applies with full force to the miscarriage of justice exception. *See, e.g.*, *Rivas*, 687 F.3d at 551 (finding that circuit decisions that found no miscarriage of justice exception "rest[ed] on an error of statutory construction, which the Supreme Court itself identified in *Holland*").

Recognizing this flaw in its position, the State attempts to distinguish *Holland* by arguing that the miscarriage of justice exception (unlike equitable tolling) would make superfluous the triggering event in § 2244(d)(1)(D) for new evidence. Br. of Pet'r 17-18, 22-23 & n.2. That too is untrue. The miscarriage of justice exception can comfortably coexist with this triggering event. By its plain terms, § 2244(d)(1)(D) allows federal courts to reach the merits of habeas claims if the petitioner filed the petition in a year of the time within which new evidence could have been discovered through reasonable diligence. That is so *regardless whether* the new evidence has anything to do with the petitioner's guilt or innocence. *See, e.g.*, *Wilson v. Beard*, 426 F.3d 653, 659-62 (3d Cir. 2005) (finding *Batson* claim timely based on new evidence of jury discrimination unrelated to petitioner's guilt).

The miscarriage of justice exception, by contrast, allows a federal court to reach the merits *only* if new evidence shows "that it is more likely than not that 'no reasonable juror' would have convicted [the petitioner]." *Schlup*, 513 U.S. at 329. Thus, § 2244(d)(1)(D) is both modestly more stringent (because it requires diligence) and dramatically less

stringent (because it requires no showing of innocence) than the miscarriage of justice exception. Many petitions that could not possibly meet that exception will be timely under § 2244(d)(1)(D). That provision will not be rendered superfluous. *See Souter*, 395 F.3d at 600.

B. The State's Concerns For "Gamesmanship" Can Be Addressed In The Regular Course

The State next turns to "policy reasons," noting that the miscarriage of justice exception would encourage "gamesmanship" by allowing petitioners to sit on their actual-innocence evidence until the prosecution's evidence has deteriorated. Br. of Pet'r 18, 25. Setting aside the fact that "claims of actual innocence are rarely successful," *Schlup*, 513 U.S. at 324, meaning that only a handful of cases would even be affected by the exception, even for this limited range of cases, the State's policy concerns are overstated. They fall far short of demonstrating why the Court should abandon this traditional exception.

To begin with, nothing about the miscarriage of justice exception incentivizes petitioners to engage in purposeful delaying tactics. After all, even in those extraordinary cases that satisfy the exception's demanding standard, *House*, 547 U.S. at 538, the result is simply to permit petitioners a gateway to "proceed . . . with [their] procedurally defaulted constitutional claims," *id.* at 555. In other words, habeas petitioners must meet a demanding standard only to be able to do what they could have *otherwise* done had they filed timely claims. Since the exception *both* requires petitioners to meet stringent standards *and* grants only limited relief to the few who can pass through its

narrow gateway, it would simply be irrational to roll the dice in the manner that the State hypothesizes.

The standards that govern the exception further minimize such incentives for delay. The new evidence necessary for the miscarriage of justice exception is not considered in a vacuum. Rather, "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327-28). Accordingly, evidence collected or presented by the State at trial would retain its full force at the *Schlup* stage, regardless of the time that has passed.

Likewise, the equitable nature of habeas proceedings enables federal courts to count unexplained delay against the petitioner. A court may "'consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.'" *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 332). Thus, even if there is a chance that an "elderly prosecution witness" might die during any delay (Br. of Pet'r 18), a petitioner could not avoid the effect of that witness's original testimony under this totality-of-the-evidence inquiry. The habeas court could, however, hold the unjustified delay *against the petitioner* when making credibility findings as to whether the exception has been met.

Nor would any such delay allow petitioners to prevent the prosecution from introducing a deceased witness's prior testimony—which would have been subject to cross-examination—at a new trial. *See Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (recognizing exception to Confrontation Clause where

witness is unavailable and the defendant had a prior opportunity for cross-examination). Indeed, when this Court granted relief in *Vasquez v. Hillery*, 474 U.S. 254 (1986), it rejected similar arguments that considered the "difficulties that [the state] will face if forced to retry the defendant" twenty years after the original trial. *Id.* at 265. "As it turned out, by relying on the transcript of the earlier trial, the state was able to secure a second conviction." 2 *Federal Habeas Corpus Practice* § 24.2[b], at 1283 n.18.

The passage of time, moreover, is a double-edged sword. A petitioner's case for innocence itself can weaken over time, should one of petitioner's witnesses fall ill or become unavailable. Any delay by a petitioner runs this risk. It also runs the risk that one of the petitioner's witnesses loses his fortitude to testify in a contested hearing. On this point, it bears noting that because much of the petitioner's evidence (unlike the State's evidence) must, by definition, be "new," that evidence is not preserved in the same way as is the State's trial evidence.

And at all events, the State ignores that "generally, a prisoner's 'principal interest . . . is in obtaining *speedy* federal relief on his claims,'" because the prisoner must remain in prison until such relief is granted. *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (emphasis added; citation omitted). To the extent incentives for delay may exist in death-penalty cases, even there, "last-minute filings that are frivolous and designed to delay executions can be dismissed in the regular course." *Panetti*, 551 U.S. at 946; *cf.* Rule 4 of the Rules Governing § 2254 Cases (permitting district court to dismiss frivolous petition immediately).

Confirming that the State exaggerates its concerns, this Court has repeatedly applied the exception in many contexts. *See supra* Part I. The exception is just as much "a sound and workable means of channeling the discretion of federal habeas courts" in this context as it is in these others. *Calderon*, 523 U.S. at 559 (internal citation and quotation marks omitted). Indeed, despite years of applying the exception, *Schlup* agreed with "Judge Friendly's observation a quarter of a century ago that 'the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.'" 513 U.S. at 322-23 (quoting Friendly, 38 U. Chi. L. Rev. at 145).

Given all of this, the State's concern (and the concern of its *amici* States) over the imposition of "substantial costs on the criminal justice system" from innocence litigation appears deeply overblown. With few petitions presenting claims of actual innocence, let alone untimely claims of innocence, the universe of cases impacted by today's case is not large. Few of these cases, moreover, will overcome the high *Schlup* hurdle, further cabining the purported costs of this narrow range of cases. Perhaps that is why only a third of the states have raised this concern. It is also perhaps why the United States, which is equally impacted by today's case, *see* 28 U.S.C. § 2255(f), has not joined Michigan's effort to close the courthouse doors to inmates who may be actually innocent.

Finally, the State notably makes no allegation that the claims *in this case* were motivated by such delaying tactics. It has not identified a prosecution witness who has died in the interim. It has not identified an unfair tactical advantage somehow gained by Perkins. And it has made no argument that any

delay here turned on improper motives rather than Perkins's continued efforts to uncover additional actual-innocence evidence and to search for legal representation. *See supra* at 9-10.

C. The State's Historical Exegesis Discusses Irrelevant Legal Principles

The State next argues that the miscarriage of justice exception does not qualify as a background rule of equity that can be incorporated into AEDPA's limitations period, noting that "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." Br. of Pet'r 19. The State is flat wrong.

To begin with, the State ignores the numerous cases in which the Court did "reaffirm[] the existence and importance of the exception." *Schlup*, 513 U.S. at 321. When repeatedly noting that "[f]ederal courts retain the authority to issue the writ of habeas corpus in [this] narrow class of cases," *McCleskey*, 499 U.S. at 494, the Court never included an expiration date on a petitioner's ability to establish innocence. That is no doubt due to the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Schlup*, 513 U.S. at 325 (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

Indeed, the State overlooks that our nation's equitable notions, reflected both in acts of Congress and decisions of our courts, generally granted *all* petitioners—not simply those claiming innocence—an *unlimited* time to file habeas petitions asserting constitutional claims. As noted, before AEDPA, there had

never been a statute of limitations for such federal habeas petitions. *See, e.g.*, *Vasquez*, 474 U.S. at 265. This history confirms not only the existence of these equitable notions, but also that AEDPA's limitations period should be interpreted narrowly—as a departure from a longstanding common-law rule. *See United States v. Texas*, 507 U.S. 529, 534 (1993).

The State, by contrast, refers to legal principles outside of habeas—such as Fed. R. Crim. P. 33 and analogous state rules—governing when a new trial may be granted based solely on claims of *newly discovered evidence*, not on claims of *constitutional error*. Br. of Pet'r 20-21. These cases are irrelevant. Petitioners who rely on the miscarriage of justice exception do not seek a new trial based on new evidence; they seek a new trial based on the constitutional claims that they have procedurally defaulted. *See House*, 547 U.S. at 555; *Sclup*, 513 U.S. at 315-16. Justice Jackson long ago noted the difference between these types of claims. When interpreting Fed. R. Crim. P. 33, he found that any miscarriages of justice from that rule's time limits for new trials was mitigated by habeas corpus, which "provide[d] a remedy for . . . *constitutional errors* at the trial *without limit of time*." *United States v. Smith*, 331 U.S. 469, 475 (1947) (emphases added).

It should be evident, then, that the State's historical argument conflates "freestanding claims of actual innocence" (in which newly discovered evidence provides the *sole* basis for relief) with "gateway" claims of actual innocence (in which constitutional error provides the grounds for relief). *See Schlup*, 513 U.S. at 313-17 (explaining differences between these claims); *Herrera*, 506 U.S. at 404 (same). This error

is confirmed by the State's reliance on *Herrera* and the authorities it discusses. *See* Br. of Pet'r 21-22. *Herrera* addressed whether the Constitution authorizes a freestanding claim of actual innocence for a trial free of constitutional error. 506 U.S. at 404. Whether or not there was any such traditional rule allowing for "substantive" actual-innocence claims to be asserted before AEDPA, *see Herrera*, 506 U.S. at 404, there unquestionably was a traditional rule allowing for "procedural, rather than substantive" assertions of actual innocence, *Schlup*, 513 U.S. at 314. It is those procedural assertions that matter here.

D. The State's Diligence Test Conflicts With The Miscarriage Of Justice Exception

The State falls back on the argument that any miscarriage of justice exception to AEDPA's limitations period must include a diligence element. Br. of Pet'r 28-29. The State is mistaken. The exception has never turned on diligence. Diligence, instead, is a component of the more common method for excusing default—cause and prejudice. *See McCleskey*, 499 U.S. at 498 (noting that "[t]he requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation"). That is why diligence is a factor under *Holland*'s equitable-tolling test, which bears similarities to the cause-and-prejudice standard. *See, e.g.*, *Lopez*, 628 F.3d at 1231 (noting that a petitioner "must demonstrate that he diligently pursued his federal claims as part of his showing of cause for the delay in filing"). The miscarriage of justice exception, by contrast, comes into play when a petitioner cannot establish cause. *McCleskey*, 499

U.S. at 494. It is, in other words, an "exception to cause." *Id.* at 495. *Rivas*, 687 F.3d at 547 n.42.

The Court's cases on the exception bear this out. For example, in *Calderon*, the Court described the "miscarriage of justice standard" as "somewhat more lenient than [AEDPA's] standard" for second petitions, because AEDPA actually included such a diligence element. 523 U.S. at 558 (citing 28 U.S.C. § 2244(b)(2)(B)(i)). And in *Keeney*, the Court adopted the miscarriage of justice exception for petitioners who failed *diligently* to develop the facts of their claims in state court; if the exception to this diligence standard itself had a diligence component, it would have rendered the exception a nullity. *See Williams*, 529 U.S. at 432-34 (describing "*Keeney*'s threshold standard of diligence"); *see also Withrow*, 507 U.S. at 700 (O'Connor, J., concurring in part and dissenting in part) (a credible showing of innocence is "sufficient, *standing alone*, to . . . justify adjudication of the prisoner's constitutional claim" (emphasis added)). Thus, both before and after AEDPA, this Court has recognized that a sufficient showing of innocence, standing alone and without any inquiry into "cause" (or diligence), permits federal courts to reach the merits of defaulted claims—whether the default occurred in state court or in the course of federal litigation. Accordingly, the courts of appeals that have adopted the exception have refused to require any diligence element. *See Rivas*, 687 F.3d at 539, 547 n.42; Pet. App. 16a-20a; *Lee*, 653 F.3d at 934; *San Martin*, 633 F.3d at 1267-68; *Lopez*, 628 F.3d at 1230-31.

The State, by contrast, relies on *Irwin* and other non-habeas cases imposing a diligence requirement for equitable tolling. Br. of Pet'r 27. But this non-

habeas law does not involve a criminal conviction and prison time or the death penalty. Innocence is never at issue. In the habeas context, by contrast, it is innocence (not diligence) that is the "ultimate equity." *Withrow*, 507 U.S. at 700 (O'Connor, J., concurring in part and dissenting in part).

It bears repeating that simply because diligence is not an element of the miscarriage of justice exception does not mean that it is irrelevant. Rather, as explained, unjustified delay may be a factor for determining whether a petitioner has made a sufficient showing of innocence. *See House*, 547 U.S. at 537; *Schlup*, 513 U.S. at 332.

E. The State Fails To Distinguish Cases Applying The Miscarriage Of Justice Exception

The State eventually acknowledges that adding a diligence element onto the miscarriage of justice exception would be a novel (and, as shown, self-defeating) graft, and the "three reasons" it offers why the Court should ignore the long "line of cases" applying that exception come up short. Br. of Pet'r 28-31.

First, the State argues that these cases have limited the use of the new evidence of innocence *only* to determining whether the petitioner has met the miscarriage of justice exception, and have not permitted the petitioner to then use the evidence to support the underlying constitutional claim. Br. of Pet'r 28-30. This argument is both mistaken and beside the point. None of the Court's cases describing the exception have said that the new evidence is limited to determining whether the exception is met. In *House*, for example, the Court gave no indication that the new evidence could not subsequently be used to establish

the petitioner's ineffective-assistance claim. 547 U.S. at 540-54. Thus, on remand, the district court held that counsel had been ineffective based on this new evidence. *See House v. Bell*, No. 3:96-cv-883, 2007 WL 4568444, at *8-*9 (E.D. Tenn. Dec. 20, 2007).

Regardless, the State's argument is irrelevant to the question presented. Whether or not new evidence relied on to establish a miscarriage of justice can be used to establish constitutional claims says absolutely nothing about whether AEDPA's limitations period incorporates the exception in the first place. And while Perkins, like the petitioner in *House*, may seek to use this evidence to establish his ineffective-assistance claim, Perkins also brings other constitutional claims that plainly will not rely on that evidence (e.g., claims concerning the jury instructions). (Dist. Ct. Records 6 through 6-5.)

Second, the State argues that its diligence requirement comports with "the *House* line of cases" because those cases concerned exceptions to procedural defaults and "did not address the diligent-pursuit requirement one way or the other." Br. of Pet'r 30-31. But, as noted, *see supra* Part III.D, no reasonable interpretation of these cases imposes a diligence requirement. *See Calderon*, 523 U.S. at 558.

Third, the State argues that this line of cases "involved an equitable exception to an equitable rule created by the Court itself," rather than a statutory rule like § 2244(d)(1) created by Congress. Br. of Pet'r 31. But the exception applied not simply to procedural defaults in state court; it also reached areas where Congress had drafted rules. In *Kuhlmann*, for example, "seven Members of this Court squarely re-

jected the argument that in light of the 1966 amendments [to the habeas statute limiting consideration of successive petitions], 'federal courts no longer must consider the "ends of justice" before dismissing a successive petition.'" *Schlup*, 513 U.S. at 320 (quoting *Kuhlmann*, 477 U.S. at 451 (plurality op.)).

In any event, even if the State were correct about the exception's reach, its argument would not lead to a different result. It would only mean that, as with equitable tolling, the exception falls within the presumption that Congress does not mean "to displace courts' traditional equitable authority absent the clearest command." *Holland*, 130 S. Ct. at 2560 (internal citations and quotation marks omitted). Incorporating the miscarriage of justice exception creates no more "separation-of-powers implications," Br. of Pet'r 31, than does incorporating equitable tolling. For both situations, Congress has not drafted the limitations period with the unambiguous clarity necessary to displace traditional equitable rules.

F. The State's Alleged Remedies Say Nothing About Whether The Limitations Period Incorporates The Exception

Lastly, while nowhere suggesting that Perkins has not adequately exhausted his constitutional claims, the State argues that a miscarriage of justice exception is unnecessary because he has two remedies under state law to establish his innocence. Br. of Pet'r 31-33. This argument fares no better.

To begin with, the State seeks a broad interpretation of AEDPA's limitations period, arguing that it does not incorporate the miscarriage of justice exception in *all* cases. It fails to explain why the fact that a particular petitioner in a particular case allegedly

has additional state remedies should be a basis for such a broad rule. To the extent the State argues that the availability of the exception should somehow depend on the particular remedies available to the particular petitioner in the particular case, it would conflict with the Court's goal of "advanc[ing] uniformity in the law of habeas corpus," *Keeney*, 504 U.S. at 10, and "pose serious administrability concerns," *Gonzalez v. Thaler*, 132 S. Ct. 641, 655 (2012).

Regardless, the State's purported remedies do not bar application of the exception. Its reliance on Mich. Ct. R. 6.502(G)(2)—which allows a petitioner to "file a second or subsequent motion based on . . . a claim of new evidence that was not discovered before the first such motion"—again confuses a substantive actual-innocence claim with a procedural actual-innocence claim. Whether or not Perkins may now raise a *free-standing* actual-innocence claim in state court, the Court may still use the actual-innocence claim as a *gateway*. Indeed, in *House*, the State argued that Tennessee law permitted the petitioner to assert his innocence in state court, *see* Br. of Resp. at 45 & n.35, *House v. Bell*, 547 U.S. 518 (2006) (No. 04-8990), 2005 WL 3226400, but this Court still found that the actual-innocence claim allowed the petitioner to "proceed on remand with [his] procedurally defaulted constitutional claims," 547 U.S. at 555.

Nor would it make sense for Perkins to return to state court to pursue his constitutional claims. For one thing, he has already pursued those claims on direct appeal as well as through a post-judgment motion under Mich. Ct. R. 6.502(G), (Dist. Ct. Record 8-3, pp. 18-23), and Perkins likely cannot raise them again under state law. *See* Mich. Ct. R. 6.508(D)(2)

(barring court from granting relief on second motion raising "grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter" absent a change in law). For another thing, it is cold comfort to, as the State suggests, inform Perkins that his remedy is to seek further constitutional guidance from the court he believes to have deeply erred already.

The State also argues (at 32-33) that AEDPA's limitations period does not incorporate the miscarriage of justice exception because innocent petitioners may seek clemency. This argument would gut the exception. As the State concedes, Br. of Pet'r 32, "[c]lemency is deeply rooted in our Anglo-American tradition of law," *Herrera*, 506 U.S. at 412-13. Yet the availability of clemency to cure injustice has never stopped the Court from applying the miscarriage of justice exception to defaulted claims. *Compare House*, 547 U.S. at 536-54 (applying exception to Tennessee conviction); *Schlup*, 513 U.S. at 330-32 (applying exception to Missouri conviction), *with* Tenn. Code Ann. § 40-20-101 (granting clemency power); Mo. Const. art. IV, § 7 (same). In short, the existence of the miscarriage of justice exception has never turned on the unavailability of state remedies for actual-innocence claims. The Court should not interpret the exception any differently here.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case should be remanded to determine whether Perkins meets the standards for application of the miscarriage of justice exception.

Respectfully submitted,

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