No. _____

In the Supreme Court of the United States

SHERMAN CAMPBELL, WARDEN, PETITIONER

v.

STEPHEN J. KARES

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress has imposed a one-year statute of limitations for state prisoners to seek habeas review of their conviction or sentence. 28 U.S.C. § 2244(d). The limitations period is statutorily tolled during the pendency of a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim" under § 2244(d)(2). A petitioner must meet two requirements for statutory tolling. First, the application must call for "judicial reexamination" of the judgment or claim, *Wall* v. *Kholi*, 562 U.S. 545, 553 (2011), as distinct from intermediate requests such as motions for discovery, which do not toll the limitations period, *id.* at 556 n.4. Second, the conforming application must be "properly filed" under state law. *Artuz* v. *Bennett*, 531 U.S. 4, 8 (2000). The questions presented are:

1. Does Michigan's statute allowing a prisoner to request DNA testing call for a "judicial reexamination" of the defendant's conviction under § 2244(d)(2) to statutorily toll the habeas limitations period, as in the Fifth and Sixth Circuits, or it is more akin to a discovery request, in line with decisions from the Second, Seventh, Ninth, Tenth, and Eleventh Circuits and the Michigan appellate courts?

2. Did Petitioner Stephen Kares "properly file" his DNA motion under state law, where he did not even attempt to satisfy the minimal pleading requirements set forth in Michigan's post-conviction DNA testing statute?

PARTIES TO THE PROCEEDING

Petitioner, Sherman Campbell, is the Warden where Respondent, Stephen Kares, is currently held in custody. Bryan Morrison, who previously was warden at the facility where Kares was held, was appellee in the court below.

RELATED CASES

- Michigan Court of Appeals, *People* v. *Stephen Kares*, No. 312680, Opinion issued November 21, 2013 (affirming conviction and sentence on direct appeal).

- Michigan Supreme Court, *People* v. *Stephen Kares*, No. 148566, Order issued May 27, 2014 (denying leave to appeal on direct appeal).

- Michigan Supreme Court, *People* v. *Stephen Kares*, No. 148566, Order issued September 29, 2014 (denying reconsideration on direct appeal).

- Shiawassee Circuit Court, *People* v. *Stephen Kares*, No. 12-3104-FH, Opinion issued February 12, 2018 (denying post-conviction motion for DNA testing).

- Michigan Court of Appeals, *People* v. *Stephen Kares*, No. 342746, Order issued August 29, 2018 (denying leave to appeal from denial of DNA motion).

- Michigan Supreme Court, *People* v. *Stephen Kares*, No. 158616, Order issued April 2, 2019 (denying leave to appeal from denial of DNA motion).

- United States District Court for the Western District of Michigan, Northern Division, *Stephen John Kares* v. *Connie Horton*, No. 2:19-cv-7, Report and Recommendation issued June 25, 2019 (recommending habeas petition be dismissed due to untimeliness).

- United States District Court for the Western District of Michigan, Northern Division, *Stephen John Kares* v. *Connie Horton*, No. 2:19-cv-7, Order issued July 30, 2019 (rejecting recommendation to dismiss habeas petition for untimeliness).

- United States District Court for the Western District of Michigan, Northern Division, *Stephen John Kares* v. *Connie Horton*, No. 2:19-cv-7, Report and Recommendation issued April 23, 2021 (recommending habeas petition be denied for untimeliness and on the merits).

- United States District Court for the Western District of Michigan, Northern Division, *Stephen John Kares* v. *Connie Horton*, No. 2:19-cv-7, Opinion issued August 3, 2021 (accepting recommendation to deny habeas petition for untimeliness and on the merits and denying a certificate of appealability).

- United States District Court for the Western District of Michigan, Northern Division, *Stephen John Kares* v. *Connie Horton*, No. 2:19-cv-7, Order issued August 3, 2021 (granting a certificate of appealability on the timeliness issue only).

- United States Court of Appeals for the Sixth Circuit, *Stephen J. Kares* v. *Bryan Morrison*, No. 21-2845, Opinion issued August 8, 2023 (holding habeas petition was timely but denying a certificate of appealability on merits claim).

- United States Court of Appeals for the Sixth Circuit, *Stephen J. Kares* v. *Bryan Morrison*, No. 21-2845, Order issued November 28, 2023 (denying petition for rehearing).

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The state trial court's opinion and order denying Kares's motion for post-conviction DNA testing, App. 206a–209a, is not reported. The Michigan Court of Appeals' order denying leave to appeal, App. 205a, is not reported. The Michigan Supreme Court's order denying leave to appeal, App. 203a–204a, is reported as a table decision at 924 N.W.2d 549.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2023. The order of the court of appeals denying Kares's petition for rehearing was entered on November 28, 2023. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d). See App. 229a.

Mich. Comp. Laws § 770.16. See App. 230a–235a.

INTRODUCTION

DNA evidence recovered from the 16-year-old victim's rape kit conclusively matched to Petitioner Stephen Kares by 1-in-2.8-quintillion odds. Kares was therefore ineligible to motion the state trial court for post-conviction DNA testing under state law. Yet, in a published opinion the Sixth Circuit held not only that Kares's motion statutorily tolled the habeas limitations period under § 2244(d)(2), but that *all* such motions will toll so long as they are placed in the hands of a court clerk. The Sixth Circuit faltered in two significant ways.

First, post-conviction motions for DNA testing are, at their core, discovery motions that do *not* call for a judicial reexamination of the defendant's conviction unless and until DNA testing is ordered and exculpatory results are obtained, *after* which the defendant can seek a new trial. The majority of circuits to address this issue follow this approach. The two outliers are the Fifth and Sixth Circuits. They hold that as long as the defendant can *ask* for both DNA testing and a new trial in the same pleading, that is sufficient to trigger statutory tolling under Antiterrorism and Effective Death Penalty Act (AEDPA). But that cannot be the rule where the first phase of the process in all iterations is merely for discovery. Only when that discovery produces exculpatory results is statutory tolling required. This is not only the proper reading of § 2244(d)(2), but it also aligns with § 2244(d)(1)(D), which allows an alternative limitations period that starts only *after* the petitioner obtains new evidence in support of a constitutional claim. That way, only those with favorable results in hand could cross the threshold for habeas review.

Second, the motion for DNA testing must be "properly filed" under (d)(2), and Kares's was not. The Sixth Circuit misconstrued state law in holding that the only filing condition a petitioner need satisfy is filing in the correct trial court. In actuality, the DNA-testing statute has four filing conditions—one for jurisdiction and three pleading requirements. Kares met the first, but not the latter three. For example, Kares had to plead that the results of any prior DNA testing were inconclusive. Plainly, he could not since the DNA in this case decisively matched to Kares. The Sixth Circuit's analysis ignores this Court's dictates to differentiate between filing conditions and relief conditions. This Court should rectify this error.

The Court should thus grant this petition or, alternatively, peremptorily reverse.

STATEMENT OF THE CASE

Kares sexually assaulted his girlfriend's 16-year-old daughter at his apartment, where he lured her under the pretense of hiring her to clean his horse saddle. Despite Kares's denial of any sexual contact, DNA recovered from both her cervix and her vagina matched to Kares with 1-in-2.8-quintillion odds.

Trial facts

Kares had been dating the 16-year-old victim's mother.[1] App. 216a. One day, he told the victim he

[1] The Michigan Court of Appeals outlined these facts after reviewing the state-court record and they are therefore presumed correct under 28 U.S.C. § 2254(e)(1). See *Sumner* v. *Mata*, 449 U.S. 539, 545–46 (1981).

would pay her to clean his horse saddle at his apartment. *Id*. But Kares had other plans. When she arrived, Kares gave her cigarettes and a pair of earrings, and he renewed his prior offer to help emancipate her from her mother. *Id*. at 217a.

As the victim cleaned the horse saddle, Kares disappeared into his bedroom. *Id*. He beckoned her inside by asking if some pants were hers. *Id*. He then closed the door, caressed her face, and said they needed to talk. *Id*. The victim said no, but Kares persisted. *Id*. He threatened her: "don't make me hurt you." *Id*. And he asked: "what do you think I'm doing this for? What do you think I'm doing all this for you for?" *Id*.

Kares ordered the victim to strip and took pictures of her, threatening to disseminate them if she ever told anyone what he did. *Id*. Kares then made the victim perform fellatio on him, and he vaginally raped her. *Id*. at 218a.

As both got dressed, Kares said he thought she would "be more into it," and asked if she had ever had sex before. *Id*. Kares also expressed concern about the police showing up at his door. *Id*. The victim assured him she would not say anything. *Id*. She stayed to finish the saddle and to eat with Kares, then her friend picked her up. *Id*. The victim promptly disclosed the rape to her friend and her mother. *Id*.

Most pertinent to the issues presented in this petition, a rape kit was performed shortly thereafter. *Id*. It revealed a perianal tear consistent with sexual contact. *Id*. The nurse also collected samples of a white substance from the victim's cervix and vagina, *both* of which matched to Kares's DNA. *Id*. at 218a–219a. The

odds of the DNA belonging to anyone else were 1 in 2.8 quintillion. (8/29/12 Trial Tr., R. 21-6, Page ID #755, 757.)

At trial, Kares conceded that the victim went to his apartment, but he denied any sexual contact with her. App. 219a. He instead claimed that she must have retrieved his DNA from a different woman's vaginal condom he had discarded several days prior. *Id*. But Kares admitted he did not know why the victim would have falsely accused him of sexual assault. *Id*.

The jury rejected Kares's denials and convicted him of third-degree criminal sexual conduct (with force or coercion) under Michigan Compiled Laws § 750.520d(1)(b). *Id*. The trial court sentenced him as a fourth-offense habitual offender to 25 years to 58 years, 4 months' imprisonment. *Id*. at 216a.

State post-conviction proceedings

Kares's conviction and sentence were affirmed on direct appeal. App. 216a, 214a. His conviction became final on December 28, 2014, 90 days after his time to petition this Court for a writ of certiorari. See Sup. Ct. R. 13, and *Gonzalez* v. *Thaler*, 565 U.S. 134, 150 (2012). He then had one year from that date to file either his federal habeas petition or an application for state post-conviction or other collateral review to toll the habeas limitations period. See § 2244(d)(1) and (2).

Kares elected to file a state motion for relief from judgment 296 days into the limitations period. The trial court denied the motion on both procedural and substantive grounds. Kares's appeals were unsuccessful, with the Michigan Supreme Court denying leave

to appeal on December 27, 2017. *People* v. *Kares*, 904 N.W.2d 605 (Mich. 2017) (unpublished table decision). Kares then had 69 days remaining on his habeas limitations period, which expired on March 6, 2018.

Prior to that expiration, Kares filed his post-conviction motion for DNA testing.

The DNA motion

On February 9, 2018, Kares filed a pro se motion for post-conviction DNA testing with the state trial court under Michigan Compiled Laws § 770.16. App. 210a–211a.

The statute operates in two, sequential phases, with the first seeking discovery—DNA testing and results—and the second seeking a new trial—once exculpatory DNA results are obtained. See *People* v. *Poole*, 874 N.W.2d 407, 414 (Mich. Ct. App. 2015). The motion must also be filed in the convicting court. Mich. Comp. Laws § 770.16(2).

The first phase, which itself has two components, sets forth the pleading requirements for DNA testing. Mich. Comp. Laws § 770.16(1) ("[A] defendant . . . who establishes that all of the following apply *may petition* the circuit court to order DNA testing. . . ." (emphasis added)). Under the first component of the first phase, defendants convicted after January 8, 2001, such as Kares, must establish *all* of the following to even get in the door:

> (a) That DNA testing was done in the case or under this act.

(b) That the results of the testing were inconclusive.

(c) That testing with current DNA technology is likely to result in conclusive results.

Id.

If the defendant satisfies those conditions, then he must make several additional showings under the second component of the first phase to compel the trial court to order DNA testing. He "shall allege that biological material was collected and identified during the investigation of [his] case." Mich. Comp. Laws § 770.16(3). Then, the "court shall order DNA testing" if the defendant presents prima facie proof that the biological material to be tested is material to the issue of identity; a sample of biological material is available for testing; that biological material was not previously tested or present testing methods were not previously available; and the identity of the perpetrator was at issue at trial. Mich. Comp. Laws § 770.16(4).

The second phase determines if the defendant is entitled to a new trial "*based on*" the results of the DNA testing. Mich. Comp. Laws § 770.16(1) (emphasis added). "If the results of the DNA testing are inconclusive or show that the defendant is the source of the identified biological material," then "[t]he court shall deny the motion for new trial." Mich. Comp. Laws § 770.16(7). But if the results show that the defendant is *not* the source, the trial court must appoint counsel and hold a hearing for the defendant to show, by clear and convincing evidence, that only the true perpetrator could be the source of the DNA, the sample was not contaminated or degraded, and a new trial

is warranted based on the defendant's purported DNA exclusion balanced against the other evidence in the case. Mich. Comp. Laws § 770.16(8).

Here, Kares's motion read, in its entirety and without a brief in support:

> NOW COMES, Stephen John Kares, the herein Defendant in pro se, seeking testing of biological material pursuant to MCL 770.16, stating the following in support:
>
> 1. Stephen John Kares, came before this Honorable Court on August 28, 2012, for a jury trial charged with two counts of CSC I.
>
> 2. At trial the Prosecution introduce[d] forensic evidence against the Defendant. However during the course of the proceedings critical discrepancies were discovered regarding the collection sites of the evidence being presented.
>
> 3. There remains numerous items of evidence that were collected by S.A.N.E., Alysia Gilreath, as established by her trial testimony, (TsII.pg.232); and pg 248), and by the Medical Forensic Examination Record, under Forensic Specimen Collection, that have not been tested for biological material. (Exhibit A). Further during the course of the investigation Shiawassee County Sheriff Deputies seized multiple items of bedding from the Defendant's residence

that have not been tested for biological material. (Exhibit B).

4. The biological material contained within these items will directly challenge key offense elements which were necessary to convict the herein Defendant. Thus Defendant is entitled to an Evidentiary Hearing on this matter and for this Court to enter an Order for the requested testing to be performed. See: People v Hernandez-Orta, 480 Mich 1101 (2008).

5. It is highly probable that with the results from this testing of the biological material the jury would have rendered a different verdict. For this evidence directly challenges the elements of identity and sexual penetration.

Relief Requested

THEREFORE, Stephen John Kares, moves this Honorable Court to ORDER the testing of the specific items previously set forth herein that were collected and identified during the investigation which led to the conviction in this matter. And for a NEW TRIAL based upon the results of the testing of said biological material.

Furthermore that this Court will appoint counsel to represent Stephen John Kares and GRANT any other relief deemed necessary.

App. 210a–211a.

A week after the motion was filed, the trial court denied it for failure to satisfy the statutory pleading requirements: "In sum, Defendant's motion does not make the showing required for him to *file* a motion under MCL 770.16." *Id.* at 207a–208a (emphasis added). The trial court denied DNA testing and did not even reach the question of a new trial. *Id.*

The Michigan Court of Appeals and the Michigan Supreme Court denied Kares's requests for appellate review. *Id.* at 203a, 205a.

The habeas proceedings in district court

Kares filed his federal habeas petition on December 21, 2018, while his application for leave to appeal in the Michigan Supreme Court was still pending. Before the State was ordered to respond, the magistrate judge issued a report and recommendation that the petition should be dismissed as untimely. App. 193a–202a. Kares objected, contending that his state motion for DNA testing tolled the limitations period under § 2244(d)(2). The district judge rejected the report and recommendation and ordered the State to respond to the petition. *Id.* at 187a–192a. The State did so.

The magistrate judge again concluded that Kares's habeas petition was untimely, rejecting Kares's tolling argument.[2] *Id.* at 65a. The magistrate judge

[2] The magistrate judge alternatively concluded that Kares's DNA motion could be considered a second or successive state motion for relief from judgment under Mich. Ct. R. 6.500, *et seq.*, which would not have been properly filed until he obtained exculpatory DNA results. App. 88a. The State does not advance that argument here.

additionally rejected each of Kares's habeas claims on the merits. *Id*. at 99a–184a.

The district judge adopted the report and recommendation, agreeing that the habeas petition was untimely due to a lack of tolling for the DNA motion.[3] *Id*. at 35a. The district judge further rejected any entitlement to equitable tolling because Kares had not advocated for it. *Id*. at 39a–40a.

The district judge went on to alternatively reject the merits of Kares's various claims, adopting the magistrate judge's analyses and denying Kares's objections. *Id*. at 41a–61a. The district judge issued a certificate of appealability (COA) only on the timeliness issue. *Id*. at 27a.

The Sixth Circuit's decision

Given the COA, Kares appealed to the Sixth Circuit. He also motioned the Sixth Circuit to expand the COA to his Sixth Amendment sentencing claim under *Alleyne* v. *United States*, 570 U.S. 99 (2013).

In a published opinion, the Sixth Circuit reversed on the timeliness issue and denied Kares's request to expand the COA. App. 2a. The court found that Kares's DNA motion met both requirements for tolling under § 2244(d)(2), which were (1) the motion was "properly filed," meaning it met the state procedural rules for filing with the court, and (2) it qualified as an "application for State post-conviction or other

[3] The district court also relied on the second-or-successive framework in reaching its decision. App. 36a–38a.

collateral review with respect to the pertinent judgment or claim." *Id.* at 8a–21a.

The Sixth Circuit first held that the motion was "properly filed," finding that the only procedural requirement is for a DNA motion to be filed with the correct circuit court under § 770.16(2), which Kares did. *Id.* at 12a. The court rejected the notion that there are any other procedural hurdles, holding that what the State averred were *filing* conditions under the statute were instead *relief* conditions. *Id.* at 13a–14a.

To the second point regarding the type of application for review, the Sixth Circuit determined that because Michigan's DNA statute allows a defendant to move for *both* DNA testing *and* a new trial in the same pleading, it called for a "judicial reexamination" of the judgment. *Id.* at 17a–18a (citing *Wall* v. *Kholi*, 562 U.S. 545, 553 (2011)). The Sixth Circuit compared Michigan's statute to Texas's DNA statute, which the Fifth Circuit has held tolls the habeas limitations period. *Id.* at 16a–17a (citing *Hutson* v. *Quarterman*, 508 F.3d 236, 238–39 (5th Cir. 2007)). The Sixth Circuit acknowledged, however, that the "majority of circuits to examine this issue have determined that post-conviction motions for discovery or DNA testing are not forms of collateral or post-conviction review." *Id.* at 15a (citing cases from the Second, Seventh, Ninth, Tenth, and Eleventh Circuits).

Finally, the Sixth Circuit declined to expand the COA to include Kares's Sixth Amendment sentencing claim. *Id.* at 21a–24a. The court concluded that the claim was procedurally defaulted and that the default could not be excused by Kares's assertion of ineffective assistance of appellate counsel. *Id.* at 22a–24a. The

claimed excuse was unavailing because it was itself defaulted, given that Kares failed to first raise it in the state courts. *Id.* at 23a–24a (citing *Edwards* v. *Carpenter*, 529 U.S. 446, 453–54 (2000)).[4] The Sixth Circuit therefore held that habeas review was barred.[5] *Id.* at 24a.

Kares subsequently sought panel rehearing on the COA issue. The Sixth Circuit ordered the State to respond. Following the State's response, the court denied rehearing. *Id.* at 228a.

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[4] In a footnote, the Sixth Circuit addressed Kares's concern that failure to expand the COA could render any opinion on the timeliness issue merely advisory. App. 24a n.7. The court allayed any concerns, noting: "The question of whether Kares' habeas petition was timely filed presents a case or controversy that this Court must resolve, even though this Court ultimately also decides to affirm the district court's decision on the merits of that petition." *Id.*

[5] The State acknowledges that it is ultimately a "prevailing party" given that the Sixth Circuit did not grant habeas relief. But the Sixth Circuit's published decision that post-conviction motions for DNA testing in Michigan statutorily toll the habeas limitations period is most certainly adverse to the State and will affect every future habeas case involving this issue. The State can thus demonstrate "injury, causation, and redressability" to confer standing. See *Camreta* v. *Greene*, 563 U.S. 692, 700 (2011). Further, Congress has permitted *any* party, prevailing or otherwise, to petition this Court for certiorari. 28 U.S.C. § 1254(1) (emphasis added); see also *Camreta*, 563 U.S. at 700 ("That language [in § 1254(1)] covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below."). Thus, there is no bar to review.

REASONS FOR GRANTING THE PETITION

I. Michigan's statute allowing a prisoner to request DNA testing cannot statutorily toll the habeas limitations period under § 2244(d)(2) because it is nothing more than a discovery request until exculpatory DNA results trigger a new-trial inquiry, as in the Second, Seventh, Ninth, Tenth, and Eleventh Circuits and contrary to the holdings of the Fifth and Sixth Circuits.

The circuits have formed a rift regarding whether post-conviction motions for DNA testing call for either discovery material or a judicial reexamination of the criminal judgment. This distinction is important because it determines whether such motions will toll the habeas limitations period under AEDPA, § 2244(d)(2). Most of the circuits have said DNA motions merely provide a means for discovery, the results of which the defendant can *then* use to argue for a new trial. The Fifth Circuit, and now the Sixth, disagree. They hold that if the defendant can make *both* requests in the same proceeding, tolling must ensue.

The prevailing principle in all these cases, however, is that a motion for post-conviction DNA testing is nothing more than a discovery motion *unless* and *until* the defendant obtains exculpatory DNA results on which he can base a request for a new trial. Accordingly, tolling for federal habeas purposes should not begin until the new-trial inquiry because that is the only component that calls for a "judicial reexamination" of the judgment under this Court's precedent.

Indeed, if DNA testing results in exculpatory results, there is no need to invoke statutory tolling at all. Under AEDPA's statute of limitations, the limitations clock begins ticking anew with the discovery of new exculpatory evidence under § 2244(d)(1)(D).

A. The state application for post-conviction review must seek a judicial reexamination of the judgment, not simply discovery material.

The one-year statute of limitations under AEDPA is statutorily tolled during the pendency of a properly filed state application for post-conviction or other collateral review. § 2244(d)(2). Because Congress did not define the term "collateral review," this Court needed to do so. *Wall*, 562 U.S. at 551. The Court defined "collateral review" as a "judicial reexamination of a judgment or claim in a proceeding outside of the direct review process." *Id.* at 553. The Court provided further guidance by example: "A motion to reduce sentence is unlike a motion for post-conviction discovery or a motion for appointment of counsel, which generally are not direct requests for judicial review of a judgment and do not provide a state court with authority to order relief from a judgment." *Id.* at 556 n.4.

This distinction makes good sense. A discovery motion seeks a *basis* on which to challenge a conviction; it is not in *itself* a challenge to the conviction, i.e., a request for review of the judgment. Indeed, the circuit courts have long recognized this distinction, even before *Wall*. See, e.g., *Ramirez* v. *Yates*, 571 F.3d 993, 1000 (9th Cir. 2001) (agreeing with the Second Circuit that discovery motions do not toll); *Hodge* v. *Greiner*,

269 F.3d 104, 107 (2d Cir. 2001) (noting that a discovery motion "did not challenge [the petitioner's] conviction," but "[r]ather, it sought material he claimed might be of help in developing such a challenge"); *Flanagan* v. *Johnson*, 154 F.3d 196, 199 (5th Cir. 1998) (holding that AEDPA "does not convey a statutory right to an extended delay . . . while a habeas petitioner gathers every possible scrap of evidence that might . . . support his claim").

The question then is, do state motions for post-conviction DNA testing provide for "judicial reexamination of a judgment" or are they merely requests for discovery, the results of which could *later* be used to seek such judicial reexamination? The circuits disagree on the answer, necessitating clarification from this Court.

B. The circuits fall into majority and minority views on this issue, and the Sixth Circuit has aligned itself with the minority view.

The circuits are divided on the question of whether post-conviction motions for DNA testing will toll the habeas limitations period under § 2244(d)(2). There is a majority view—holding that such motions do *not* toll because they merely seek discovery—and a minority view—holding that if such motions request discovery *and* a new trial, they will toll the limitations period. The Sixth Circuit has erroneously adopted the minority view.

The majority view. As the Sixth Circuit acknowledged in its opinion in this case, "[t]he majority of

circuits to examine this issue have determined that post-conviction motions for discovery or DNA testing are not forms of collateral or post-conviction review." App. 15a. Those include the Second, Seventh, Ninth, Tenth, and Eleventh Circuits. See *Woodward* v. *Cline*, 693 F.3d 1289, 1293 (10th Cir. 2012); *Price* v. *Pierce*, 617 F.3d 947, 952–53 (7th Cir. 2010); *Ramirez*, 571 F.3d at 993; *Brown* v. *Sec'y for Dep't of Corr.*, 530 F.3d 1335, 1337 (11th Cir. 2008); and *Hodge*, 269 F.3d at 104. *Ramirez* and *Hodge* concerned strictly discovery motions, while *Price*, *Woodward*, and *Brown* specifically dealt with motions for post-conviction DNA testing in Illinois, Kansas, and Florida, respectively.

The unifying factor in the latter cases was that the motions merely provided a means to obtain the DNA testing and results, which could *later* be used to request a new trial. See *Woodward*, 693 F.3d at 1293; *Price*, 917 F.3d at 952–53; and *Brown*, 530 F.3d at 1337. They were not in themselves requests for a new trial. That is, they merely sought discovery. As *Brown* observed, it is "well-settled that a discovery motion does not [toll]." 530 F.3d at 1338 (citing *Hodge*, 269 F.3d at 107, and *Flanagan*, 154 F.3d at 199); accord *Wall*, 562 U.S. at 556 n.4.

District courts in seven additional states have reached the same conclusion, as the magistrate judge recognized in this case. See App. 83a–85a (citing decisions from district courts in Washington, Arizona, North Carolina, Pennsylvania, Ohio, Rhode Island, and California).

The minority view. "Only the Fifth Circuit has determined that a motion for post-conviction DNA testing qualifies as a collateral review motion." App. 16a

(citing *Hutson*, 508 F.3d at 237). *Hutson* analyzed Texas's post-conviction DNA statute, Tex. Code Crim. P. art 64.01. 508 F.3d at 238. Under that statute, a Texas defendant must meet certain requirements before testing may be ordered, including that the evidence was not previously tested, identity was an issue in the case, and a preponderance of the evidence shows that the defendant would not have been convicted with exculpatory DNA results. *Id*. Then, once the results are examined by the trial court, the court "shall hold a hearing and make a finding as to whether it is reasonably probable that the person would not have been convicted had the results been available during the trial of the offense." *Id*.

The Fifth Circuit held that because the Texas statute ultimately calls for the trial court to hold a hearing after ordering testing and to make a finding as to exoneration, a filing under the Texas DNA statute tolls the habeas limitations period under § 2244(d)(2). *Id*. at 240. The court reasoned that "the motion for post-conviction DNA proceedings is seeking to challenge that judgment by potentially requiring that the trial court hold a hearing to determine whether it was reasonably probable that the convicted person would have been acquitted given the DNA results." *Id*. at 239. Thus, the court held, "Hutson's motion for DNA testing is a request for 'review' of the judgment pursuant to which he is incarcerated." *Id*. In essence, *Hutson* held that the Texas statute provides for *both* discovery *and* review of the underlying judgment, thus qualifying for tolling under § 2244(d)(2).

But subsequent Texas precedent has called *Hutson* into serious question. As the magistrate judge

noted below, whatever vitality *Hutson* may have previously had is now defunct considering more recent state law to the contrary. App. 85a–86a n.9 ("The Fifth Circuit's holding in *Hutson* is suspect," and the premise upon which it was based "is no longer the case."). The magistrate judge found strong support in Justice Thomas's dissent in *Skinner* v. *Switzer*, 562 U.S. 521, 538 n.2 (2011), which Justices Kennedy and Alito joined. Justice Thomas noted that the Court of Criminal Appeals of Texas rendered *Hutson*'s reasoning incorrect. *Id.* The Texas court held, "The jurisdictional purpose of Chapter 64 is simply to provide deserving applicants with a mechanism for post-conviction DNA testing and a favorable finding on the record if justified by that testing; it does not include any other remedy or form of relief in the convicting court." *Texas* v. *Holloway*, 360 S.W.3d 480, 485–90 (Tex. Crim. App. 2012), *overruled in part on other grounds by Whitfield* v. *Texas*, 430 S.W.3d 405, 409 (Tex. Crim. App. 2014). Accordingly, the Fifth Circuit was wrong: the Texas DNA statute solely provides a means of discovery, *not* review as well.

As for district court support of the minority view, only two concur. See App. 86a (citing decisions from district courts in New Jersey and New York).

The Sixth Circuit. In this case, the Sixth Circuit aligned itself with *Hutson*. The court reasoned that "the statute at issue in the Fifth Circuit case, Texas Code of Criminal Procedure Article 64, is the most analogous to MCL § 770.16." App. 16a. "Unlike the statutes at issue in the other circuits' decisions, Texas' statute provides a mechanism for review of the underlying judgment by setting forth the procedures that a

court *must follow* after receiving the results of post-conviction DNA testing." *Id.* at 16a–17a (emphasis in original). The Sixth Circuit then held that "[s]imilarly, upon receipt of DNA testing results showing that the defendant is not the source of the identified biological material, section (8) of MCL § 770.16 requires a reviewing court to hold a hearing and decide whether the defendant is entitled to a new trial." *Id.* at 17a.

The Sixth Circuit rejected the State's argument to the contrary: that Michigan's DNA statute provides for discovery material unless and until the trial court orders DNA testing and the defendant obtains an exculpatory result. *Id.* The Sixth Circuit construed the State's argument as one based on the success or failure of the motion, rather than the outcome for which the DNA motion calls—either discovery or a new trial. *Id.* at 17a–18a. As the Sixth Circuit put it, "Petitioner's failure to obtain relief does not address whether the statute itself calls for collateral review of the judgment." *Id.* at 18a. The Sixth Circuit also found it significant that the Michigan statute does not require defendants to file separate motions for DNA testing and for a new trial based on the results of any testing, that only one such motion is necessary. *Id.*

But that reading does not align with *Wall*. It is only the new-trial phase of the process that calls for a "judicial reexamination" of the judgment. That is the point at which any tolling should be triggered. And without *Hutson*, given its obsolete reasoning, the Sixth Circuit joins the Fifth as the lonely outliers on this issue.

C. The minority view is incorrect; the line is drawn between discovery and judicial review to facilitate exhaustion in the state courts, obviating any need for federal tolling *unless* and *until* DNA testing is ordered and exculpatory results are obtained.

The Fifth and Sixth Circuits got it wrong. Even if a motion for DNA testing can simultaneously *ask* for a new trial in addition to DNA testing, the new-trial inquiry is triggered only when the trial court grants DNA testing *and* the defendant receives an exculpatory test result. Thus, it is far from guaranteed that the trial court will engage in a new-trial analysis at all, and yet, in the Fifth and Sixth Circuits, a DNA motion will *always* toll the habeas limitations period. The discovery-only aspect of the motion does not call for a "judicial reexamination" of the judgment and therefore cannot toll under § 2244(d)(2).

The difference between the majority and minority views is whether the state mechanism for post-conviction DNA testing seeks *only* discovery material or such material *and* review of the underlying judgment, regardless of whether or when the former triggers the latter. But that is the wrong calculus. The fact of the matter is that *all* motions for post-conviction DNA testing are requests for discovery *unless* and *until* testing is ordered and exculpatory results are obtained. To toll the habeas limitations period for the discovery portion of the process would frustrate the purpose of AEDPA's tolling provision to pause the clock for a state court to determine the validity of the defendant's conviction or sentence. This is because that paused time allows the state courts the

opportunity, in the first instance, to correct any mistakes in the criminal-justice process, which may obviate any need for federal habeas review. Indeed, statutory tolling finds its roots in the exhaustion doctrine requiring habeas petitioners to present all constitutional claims first to the state courts for potential resolution. *Artuz* v. *Bennett*, 531 U.S. 4, 10 (2000) (noting that tolling "enable[s] the exhaustion of available state remedies—which is the object of § 2244(d)(2)").

What is more, state courts in Michigan can grant relief based on factual innocence proved by exculpatory DNA results, see *People* v. *Cress*, 664 N.W.2d 174, 182 (Mich. 2003) (standard for granting relief for newly discovered evidence claims of innocence), whereas habeas courts can use those same DNA results only as a gateway to address constitutional challenges, see *McQuiggin* v. *Perkins*, 569 U.S. 383, 386 (2013) ("We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations."). In fact, habeas courts are *barred* from granting relief based solely on an actual-innocence claim. *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993) ("This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.").

That is why the limitations period is paused only once the habeas petitioner has a factual ground to challenge the validity of his conviction and *not* for the time it takes him to search for those factual grounds. The federal concern is a potential constitutional or

legal infirmity that the state courts should be allowed to correct before resorting to federal review.

It is true that the statutes at issue in the Seventh, Tenth, and Eleventh Circuit cases called for separate filings to seek a new trial, whereas Michigan does not. But while Michigan does not require an independent *filing* to seek a new trial, it does require an independent *inquiry* for a new trial. That inquiry follows the discovery phase *only if* the defendant obtains the discovery he requests, i.e., *exculpatory* DNA test results. § 770.16(8). The motion for new trial must be "*based on* the results of that [DNA] testing." § 770.16(1) (emphasis added). And the Michigan courts are firm that they are "not statutorily permitted to conflate the two phases of analysis." *Poole*, 874 N.W.2d at 414. Thus, there is a hard line drawn between ordering testing and weighing the propriety of a new trial. Put differently, it is "not until after the DNA testing ha[s] occurred . . . that the defendant's separate claim of actual innocence [i]s ripe." *Price*, 617 F.3d at 952.

None of the discovery phases in any post-conviction motion for DNA testing call for a "judicial reexamination" of the judgment, as required under *Wall*. Even if the *motions* for testing and for a new trial are not separate, the *analyses* very much are. See *Poole*, 874 N.W.2d at 414. And the new-trial analysis may not come for weeks or months even if the defendant does meet the threshold for testing *and* receives an exculpatory result. Congress could not have intended § 2244(d)(2) to operate in that fashion. Accordingly, the habeas limitations period should not be tolled unless and until the new-trial inquiry is triggered.

D. The effect of a post-conviction DNA motion on the habeas limitations period is better addressed by starting the clock when the petitioner obtains exculpatory DNA results under § 2244(d)(1)(D).

If the above approach seems untenable, Congress has already provided a more prudent solution: the "new evidence" timeline under § 2244(d)(1)(D). In that paradigm, the limitations clock would begin ticking once the petitioner obtained exculpatory DNA results.

Congress has outlined four scenarios from which the one-year habeas limitations period shall run. It is the *latest* of those scenarios that governs. § 2244(d)(1). While the most common scenario is the finality of the defendant's conviction upon conclusion of direct review under § 2244(d)(1)(A), another is "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," under § 2244(d)(1)(D).[6] Thus, if the petitioner has in hand new DNA test results tending to show that he did not commit the crime for which he was convicted, and on which he can base a constitutional claim—as is required for habeas review—then the limitations period would begin on that date.

In fact, the Eleventh Circuit follows that approach. "If such [DNA] motions produce newly discovered exculpatory evidence, AEDPA grants the movant a year from that discovery, subject to tolling while

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[6] AEDPA employs a similar standard for second-or-successive petitions if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B).

related state collateral attacks are advanced, to challenge their conviction in federal habeas proceedings." *Brown*, 530 F.3d at 1338 (citing § 2244(d)(1)(D)). The Tenth Circuit has echoed that reasoning, noting this approach "does not create an impediment to federal review based on new DNA evidence." *Woodward*, 693 F.3d at 1294 (citing *Brown*, 530 F.3d at 1338).

This is a more prudent metric for timeliness, as envisioned by AEDPA itself. If a defendant requests new DNA testing, the trial court orders it, and the results are exculpatory, then either the petitioner will get a new trial under state law or he can file a habeas petition. The petition will be timely so long as he files it within one year of obtaining the exculpatory test results. See § 2244(d)(1)(D). This is a fairer, more just path for all parties because it will ensure that all deserving petitioners—and only deserving petitioners—will have their claims heard. This path will also promote exhaustion of claims in the state courts and thereby possibly relieve any need for federal intervention. After all, if a petitioner is not even eligible for new testing to be ordered, there should not have been any need for tolling under AEDPA in the first place.[7]

Statutory tolling, by contrast, will allow habeas review for *all* petitioners regardless of the merit of

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[7] Equitable tolling is another possibility, via the actual-innocence gateway to review. "[A] convincing showing of actual innocence enable[s] habeas petitioners to overcome a procedural bar to consideration of the merits of their constitutional claims," including the statute of limitations. *McQuiggin*, 569 U.S. at 386. Truly exculpatory DNA test results would be particularly compelling proof of actual innocence. See *Dist. Attorney's Office for 3d Jud. Dist.* v. *Osborne*, 557 U.S. 52, 62 (2009). Such proof could open the gate to habeas review, even if the petition was untimely.

their DNA motions. This has significant potential for abuse. For instance, Michigan does not limit the number of DNA motions a defendant may file. See *Poole*, 874 N.W.2d at 412. So, Michigan petitioners could achieve indefinite delay by strategically filing such motions. Under § 2244(d)(2), those petitioners will get an automatic pause upon filing their DNA motion, regardless of whether they ever obtain new testing, let alone exculpatory results. "This would turn § 2244(d)(2) into a *de facto* extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay." *Artuz*, 544 U.S. at 413. That cannot be how Congress intended AEDPA to operate.

Lastly, if a prospective habeas petitioner has any lingering concern about the status of his limitations period as he pursues his state remedies, he need not fear. He can file what this Court has dubbed a " 'protective' petition in federal court and ask[ ] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Pace* v. *DiGuglielmo*, 544 U.S. 408, 416 (2005) (citing *Rhines* v. *Weber*, 544 U.S. 269, 278 (2005)). Accord *Price*, 617 F.3d at 954–55 (citing *Pace*, 544 U.S. at 416).[8]

In sum, DNA motions cannot and should not toll the limitations period under § 2244(d)(2) unless and until the petitioner obtains exculpatory DNA results to then seek a new trial. But even then, the best path forward is to instead restart the limitations clock upon discovery of exculpatory DNA results.

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[8] Or he could file a petition with his claims unrelated to his discovery and then file a second-or-successive petition when the favorable DNA results emerge under § 2244(b)(2)(B).

II. Kares did not "properly file" his DNA motion under state law where he did not even attempt to satisfy the minimal pleading requirements set forth in Michigan's post-conviction DNA testing statute.

Even if a post-conviction motion for DNA testing in Michigan does qualify as an application for review under § 2244(d)(2), Kares's motion cannot trigger statutory tolling for another, independent reason: it was not "properly filed" under state law. The Sixth Circuit erroneously held that Michigan defendants need only file in the convicting court for the filing to be proper. In reality, there are three additional filing conditions, none of which Kares satisfied or even attempted to satisfy. Hence, he is not entitled to tolling, and his habeas petition should have been dismissed as untimely.

A. State law governs whether a state application for post-conviction review is "properly filed" under § 2244(d)(2).

An application for post-conviction review "is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz*, 531 U.S. at 8 (emphasis omitted). "These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee." *Id.* (footnote omitted). "In some jurisdictions the filing requirements also include, for example, preconditions imposed on particular abusive filers . . . or on all filers generally." *Id.*

To determine whether a filing under § 2244(d)(2) is "proper," the federal courts look to state law. In

Artuz, this Court consulted New York law to ascertain the applicable filing conditions. 531 U.S. at 10–11. Further, in *Pace*, this Court examined Pennsylvania law and relied on the state court's holding that the filing at issue there was improper under state law. 544 U.S. at 417 ("Because the state court rejected petitioner's PCRA petition as untimely, it was not 'properly filed,' and he is not entitled to statutory tolling under § 2244(d)(2)."). The courts of appeals uniformly defer to state law as well. See, e.g., *Loftis* v. *Chrisman*, 812 F.3d 1268, 1272 (10th Cir. 2016), and *Vroman* v. *Brigano*, 346 F.3d 598, 603 (6th Cir. 2003).

In determining whether a post-conviction application is properly filed, courts distinguish between conditions for *filing* (i.e., satisfaction of the requirements to even initiate a petition), and conditions for obtaining *relief* (i.e., raising a meritorious, non-defaulted argument). *Artuz*, 531 U.S. at 11 (distinguishing between a condition to filing, which, if not fulfilled, would render a motion improperly filed, and a condition to obtaining relief, which, if not fulfilled, has no bearing on whether the motion was properly filed); see also *Pace*, 544 U.S. at 417 (distinguishing between conditions that "go to the very initiation of the petition and a court's ability to consider that petition," and those that "go to the ability to obtain relief").

So, if the *filing* conditions are not met, such an application is not properly filed and therefore *does not* serve to toll the statute of limitations. If, on the other hand, only the *relief* conditions are not met, the application, though meritless, can still be properly filed and serves to toll the statute of limitations.

Kares's post-conviction DNA motion was not properly filed in this case, for two reasons. First, the Sixth Circuit conflated Michigan's post-conviction DNA motion *filing* conditions with *relief* conditions. Second, Kares did not even plead, let alone satisfy, the filing conditions.

B. The Sixth Circuit misconstrued state law and conflated the requisite *filing* conditions with *relief* conditions.

The Sixth Circuit held that the only filing condition for a post-conviction DNA motion in Michigan is that the motion must be filed in the correct trial court. App. 12a (citing § 770.16(2), which states that a "petition under this section shall be filed in the circuit court for the county in which the defendant was sentenced"). That is incorrect.

The Sixth Circuit ignored the preceding provision in the statute, which states that a defendant "*may petition*" the trial court for DNA testing only if the defendant "establishes that all of the following apply":

> (a) That DNA testing was done in the case or under this act.
>
> (b) That the results of the testing were inconclusive.
>
> (c) That testing with current DNA technology is likely to result in conclusive results.

§ 770.16(1) (emphasis added). The phrase "may petition" is initiating language—that is, *filing* language.

See *Pace*, 544 U.S. at 417 (noting that filing conditions "go to the very initiation of a petition").

In reaching its erroneous conclusion, the Sixth Circuit instead construed the latter pleading requirements as factors to determine the success or failure of the motion on the merits, i.e., relief conditions. App. 12a–14a. That reading rested on two faulty premises.

The first is that judicial scrutiny cannot be used to evaluate the propriety of a filing. This Court has already rejected such reasoning. In *Pace*, the habeas petitioner argued that "conditions to filing are merely those conditions necessary to get a clerk to accept the petition, as opposed to conditions that require some *judicial* consideration." 544 U.S. at 414 (cleaned up; emphasis in original). Not so, said this Court: the need for "judicial scrutiny" does not automatically convert a filing condition to a relief condition. *Id*. (citing *Artuz*, 531 U.S. at 9). While in this case the Sixth Circuit acknowledged *Pace*'s holding that judicial scrutiny is not in itself fatal to the propriety of a filing, App. 11a, the court nevertheless treated judicial scrutiny as if it were fatal. The court summarily concluded that the filing conditions were instead relief conditions that speak to the success or failure of the motion, not the propriety of the filing. App. 12a–13a. But this goes to the heart of using judicial scrutiny to discern the propriety of the filing and conflicts with this Court's reasoning in *Pace*.

In addition, the Sixth Circuit contradicted its *own* precedent holding that judicial scrutiny can be applied to filing conditions. See *Williams* v. *Birkett*, 670 F.3d 729 (6th Cir. 2012). In *Williams*, the Sixth Circuit held that a second or successive motion for relief from

judgment in Michigan is not "properly filed" unless the defendant can meet one or both exceptions to the general bar against such motions. *Id*. at 736. The court deemed the exceptions "conditions to filing" rather than "conditions to obtaining relief," under *Artuz*. *Id*. at 733. Further, comparing the case to *Pace*, the court noted that "Michigan's rule against successive motions prevents a second petition from even being considered by the court," and "even though M.C.R. 6.502(G)(2) may require judicial scrutiny to determine whether an exception applies, that does not require this court to hold that a successive motion in Michigan may be considered 'properly filed.' " *Id*. at 733–34. In this case, the court attempted to distinguish *Williams* but only on the basis that Michigan "does not allow" successive motions for relief from judgment save for the two exceptions, whereas DNA motions are not so restricted. App. 13a. That is a distinction without a difference, because in both cases judicial scrutiny is required to determine the propriety of the filing.

The second faulty premise is that the clerk's acceptance of the filing necessarily renders the filing proper. The Sixth Circuit held that Kares's DNA motion was properly filed because the trial court did not reject or "flatly return" the motion. App. 13a. That analysis stopped too short. This also goes back to *Pace*, where this Court rejected the notion of "a juridical game of 'hot potato,' in which a petition will be 'properly filed' so long as a petitioner is able to hand it to the clerk without the clerk tossing it back." 544 U.S. at 414. Harkening back to judicial scrutiny, the propriety of a filing does not rest solely with the court clerk. *Artuz* held that if a clerk erroneously accepts a filing, it will be "pending" but not "properly filed." 531

U.S. at 9. Sometimes, as this Court recognized in *Pace* and the Sixth Circuit reiterated in *Williams*, the judge must engage in some level of analysis to determine if the filing was proper. If it was not, the judge could dismiss the filing *or* deny the requested relief for failure to meet the filing requirements.

The latter is precisely what happened in this case, where the state trial court denied Kares's DNA motion because he "d[id] not make the showing required for him to *file* a motion under MCL 770.16." App. 208a (emphasis added). The phrasing of the trial court's order as a denial versus a dismissal, or the fact that such rejection came from the court rather than the clerk, do not defeat the point: Kares's motion was improperly filed under state law.

C. Having established the correct filing conditions, Kares did not even attempt to satisfy them.

In this case, Kares did not even plead, let alone meet, the filing conditions for his post-conviction DNA motion. The state trial court rejected Kares's motion for that very reason. See App. 208a.

As noted, Michigan's DNA statute operates in sequential phases. See *Poole*, 874 N.W.2d at 414. The first provides a means for discovery while the second provides a means for relief. Importantly, the first phase contains the filing conditions. These are requirements the defendant must meet for the trial court to even consider his motion.

These phases are dispositive in this case because Kares never even made it to the first phase for testing.

The filing conditions for a Michigan post-conviction DNA motion are clear such that any defendant, and Kares in particular, would know from the time of filing whether he could meet those conditions. These include simple, factual assessments: whether DNA testing had been done; if so, that the results were inconclusive; and that new testing would likely yield conclusive results. § 770.16(1). It is quite easy for defendants to discern the first two requirements—the results, if any, will be either conclusive or inconclusive. In Kares's case, the results were *conclusive*: the DNA unassailably matched to him with a probability of one in 2.8 quintillion. Thus, Kares knew or should have known that there was previous testing and the results were *not* inconclusive, and that he was therefore precluded from post-conviction DNA testing under § 770.16(1).

The state trial court concluded as much. The court noted that Kares did "not address any of these three prongs," including failure to identify any biological testing as DNA testing, made "no argument that the results were inconclusive," and failed to "claim that current testing would yield a conclusive result." App. 207a. Hence, the trial court concluded, Kares "has not shown that he qualifies to *petition* this Court to order DNA testing." *Id*. (emphasis added). And again, at the end of the opinion, the trial court ruled that Kares failed to "make the showing required for him to *file* a motion under MCL 770.16." *Id*. at 208a. Those findings show that Kares's petition was not "properly filed" and should not have tolled the habeas limitations period under § 2244(d)(2).

As further evidence of his failures, the trial court found Kares's efforts lacking under § 770.16(4) for testing as well. *Id*. The court found that the exhibits Kares provided showed "only that investigators collected biological material during the investigation of this crime," including biological material from the victim and bedding from Kares's residence. *Id*. But Kares did not establish that the material from the victim "is still available for testing, that it went untested at the time of trial, or that it could be subject to more sophisticated testing protocols." *Id*. Further, with respect to Kares's bedding, that was not in itself biological material, nor did Kares show whether it had previously been tested. *Id*.

Finally, Kares made "no argument on the third prong of the test, that his identity as the perpetrator was at issue during the trial."[9] *Id*. Nor could he—because this was not a "whodunit" case. The competing theories at trial were that either Kares sexually assaulted the victim or that *no one* did. Even in his testimony, Kares contended not that someone *else* raped the victim but that she fabricated the allegation entirely. Identity is an issue of who, not whether.

For this litany of reasons, Kares plainly failed as a legal matter to abide by the "the applicable [state] laws and rules governing filings." *Artuz*, 531 U.S. at 8. This Court has been clear that "a petition that cannot even be initiated or considered . . . is not 'properly filed.' " *Pace*, 544 U.S. at 417.

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[9] While Kares testified that he did not have any sexual contact with the victim, the fact remains that Kares did not plead that point as required under the statute. See § 770.16(4)(b)(iii).

In sum, the Sixth Circuit misinterpreted state law in concluding that there was a singular filing condition under § 770.16 and that Kares met that condition. In actuality, there are *four* filing conditions, only *one* of which Kares satisfied by filing his motion in the correct court. Completing only 25% of the state requirements, Kares's DNA motion was not properly filed, and tolling under § 2244(d)(2) was not warranted.

CONCLUSION

The petition for writ of certiorari should be granted or, in the alternative, this Court should peremptorily reverse the judgment below.

Respectfully submitted,

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