No. 23-942

IN THE
Supreme Court of the United States

SHERMAN CAMPBELL, WARDEN,

Petitioner,

v.

STEPHEN J. KARES,

Respondent.

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

BRIEF FOR RESPONDENT

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INTRODUCTION

The Sixth Circuit denied Stephen Kares's habeas petition: Although the court held that Mr. Kares's habeas petition was timely filed and did not deny that his underlying *Alleyne* claim was meritorious, it ultimately found that claim procedurally defaulted.

Not content to take its win, Michigan now asks this Court to grant certiorari to edit out the Sixth Circuit's ruling on timeliness. And the sum total of its argument that this Court should break from its near-universal practice of denying petitions filed by prevailing parties is three sentences in one footnote. The sole case it cites, *Camreta v. Greene*, 563 U.S. 692 (2011), doesn't support certiorari here.

The only way this Court should grant certiorari is if Michigan waives its procedural default defense and acquiesces to this Court's vacatur of the Sixth Circuit's procedural default holding. At that point, the timeliness question would become outcome dispositive, and certiorari may be warranted as to both of Michigan's questions presented. Absent such a waiver, however, this Court should deny the petition for certiorari.

STATEMENT OF THE CASE

1. Sentencing and Direct Appeal

After a partial acquittal, Mr. Kares was convicted of third-degree criminal sexual conduct. A jury determined the maximum time that Mr. Kares would spend in prison. But, pursuant to Michigan sentencing practices at the time, a judge decided the minimum time that Mr. Kares had to serve before becoming parole eligible. Sentencing Tr., R. 21-8,

PageID.933-74; *see People v. Lockridge*, 870 N.W.2d 502, 516-19 (Mich. 2015).

That minimum sentence was based in part on facts found by a judge by a preponderance of the evidence—that is, facts that were neither admitted by Mr. Kares nor found by a jury beyond a reasonable doubt. Sentencing Tr., R. 21-8, PageID.40-58; s*ee Lockridge*, 870 N.W.2d at 506. Specifically, the sentencing judge found five "Offense Variables," which increased Mr. Kares's minimum sentence from 78-260 months to 117-320 months. Sentencing Information Report, RE 21-12, PageID.1122. Relying on the higher range, the judge ultimately sentenced Mr. Kares to serve a minimum of 300 months. *Id.*

Soon thereafter, this Court decided *Alleyne v. United States*, 570 U.S. 99 (2013). *Alleyne* held that, under the Sixth Amendment and Due Process Clause, "[a]ny fact that, by law, increases the penalty for a crime" must be found by a jury beyond a reasonable doubt. *Id.* at 103. Pursuant to *Alleyne*, the Michigan Supreme Court and the Sixth Circuit both ruled it unconstitutional for Michigan's sentencing scheme to rely on "Offense Variables" found by a judge by a preponderance of the evidence. *Lockridge*, 870 N.W.2d at 506; *Robinson v. Woods*, 901 F.3d 710, 716 (6th Cir. 2018).

Meanwhile, Mr. Kares's court-appointed counsel appealed his conviction. But his counsel failed to raise an *Alleyne* claim on direct appeal. As a result, the Michigan Court of Appeals and, subsequently, the Michigan Supreme Court, affirmed Mr. Kares's conviction and sentence. *See* Pet. App. 216a, 214a. That conviction and sentence became final on

December 28, 2014. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012).

2. State Collateral Review

On October 20, 2015, Mr. Kares, proceeding *pro se*, filed a motion in the sentencing court seeking relief from judgment under Mich. Ct. R. 6.502. *See* Motion for Relief from Judgment, RE 21-10, PageID.981-1032. Mr. Kares argued that the court violated his Fourteenth Amendment right to due process, which "requires the prosecution to prove every element of a crime beyond a reasonable doubt." *Id.* at PageID.1018-20. The state trial court denied Mr. Kares's motion. Opinion and Order, RE 21-11, PageID.1071.

Mr. Kares filed for leave to appeal the trial court's ruling in the Michigan Court of Appeals. Application for Leave to Appeal, RE 21-15, PageID.1237. That court grants leave to appeal based on "the merits of the particular defendant's claims." *See Halbert v. Michigan*, 545 U.S. 605, 617-19 (2005). Citing *Alleyne*, Mr. Kares explained that the use of "[a]ny information applied to a defendant's sentence not admitted to by the defendant or found by the jury" was unconstitutional. Application for Leave to Appeal, RE 21-15, PageID.1272. Because his minimum sentence range was based on several offense variables found by a judge by the preponderance of the evidence, he argued, *Alleyne* rendered his sentence unconstitutional. *Id.* at PageID.1272-75. The Michigan Court of Appeals denied Mr. Kares's application for leave to appeal on the ground that he had "failed to establish that the trial court erred in denying his motion for relief from judgment." Order, RE 21-15, PageID.1298. Mr. Kares then applied for leave to appeal to the Michigan Supreme Court, which

denied his application on December 27, 2017, holding that he "failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." Order, RE 21-19, PageID.1474.

On February 5, 2018, Mr. Kares filed a motion in Michigan trial court under Mich. Comp. L. Section 770.16, one of Michigan's "New Trial" statutes. *See* Pet. App. 210a-211a. If that motion is successful, the statute entitles a petitioner first to DNA testing, then to an evidentiary hearing, and finally to a new trial. *See* Mich. Comp. L. § 770.16.

The Michigan trial court denied Mr. Kares's petition. It found that the motion did not make out a prima facie case under the statute because it "contain[ed] no argument" that there was inconclusive DNA testing done in Mr. Kares's criminal case and that current technology would likely provide conclusive results. Pet. App. 207a. The Michigan Court of Appeals affirmed the denial, followed on April 2, 2019, by the Michigan Supreme Court, which did the same. Pet. App. 205a; Pet. App. 203a-204a.

3. Federal Habeas Proceedings

The Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-32, 110 Stat. 1214 (AEDPA) establishes a one-year statute of limitations for habeas petitions. 28 U.S.C. § 2244(d)(1). In the present case, that one-year period began on December 28, 2014, when Mr. Kares's criminal conviction and sentence became final. *See* 28 U.S.C. § 2244(d)(1)(A).

AEDPA tolls that statute of limitations for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is

pending." 28 U.S.C. § 2244(d)(2). In Mr. Kares's case, the statute of limitations was indisputably tolled from October 20, 2015 until December 27, 2017, while Mr. Kares's Rule 6.502 motion was pending. *See* Motion for Relief from Judgment, RE 21-10, PageID.981-1032. Mr. Kares then filed his Section 770.16 motion on February 5, 2018, before the statute of limitations period ran out. *See* Pet. App. 210a-211a.

On December 21, 2018, while the Section 770.16 motion was still pending, Mr. Kares filed a federal habeas petition raising, as relevant here, his *Alleyne* claim.[1] Habeas Petition, RE 1. Michigan did not—indeed, has never—contested the merits of that claim. *See generally* State's Answer, RE 20; AB; Pet. Nor has any federal court concluded that Mr. Kares's *Alleyne* claim lacks merit. *See* Pet. App. 1a-202a.

Instead, the magistrate and district court judges found that Mr. Kares's *Alleyne* claim was procedurally defaulted. Pet. App. 121a-123a; Pet. App. 30a. They also held—albeit for different reasons—that Mr. Kares's Section 770.16 motion did not toll the habeas statute of limitations, and the statute of limitations period had therefore run out. Pet. App. 77a; Pet. App. 30a. On this score, the magistrate judge found that the Section 770.16 motion did not toll the statute of limitations because it was not a motion for "collateral review." Pet. App. 88a. The district court rejected that reasoning, concluding instead that the Section 770.16 petition was not "properly filed." Pet. App. 35a-37a. The magistrate judge recommended, and the district

[1] Mr. Kares did not appeal the denial of his other claims for relief, and they are not at issue at this stage.

court granted, a certificate of appealability on the timeliness issue. *See* Pet. App. 185a, 27a.

Mr. Kares appealed to the Sixth Circuit. He explained that his habeas petition was timely given that he had "properly filed" his Section 770.16 motion, and that a Section 770.16 motion is one for "collateral review." *See* OB 43-64. He also argued that his *Alleyne* claim was not procedurally defaulted and asked the court to expand his certificate of appealability to include that claim. *See* OB 36-43. In response, Michigan contested whether Mr. Kares's habeas petition was timely but declined to argue that he had procedurally defaulted. AB 48.

The Sixth Circuit agreed with Mr. Kares that his habeas petition was timely filed. Pet. App. 8a-21a. In coming to that conclusion, it determined first that Mr. Kares's Section 770.16 motion was "properly filed." Pet. App. 8a-21a. The Court explained that Section 770.16 sets forth only one condition for filing a petition, namely that the petition be "filed in the circuit court for the county in which the defendant was sentenced." Pet. App. 12a (citing Section 770.16(2)). Mr. Kares met that condition. *See* Pet. App. 12a. Any other conditions set forth in the statute, the court explained, related to a petitioner's ability to obtain relief, not to file in the first place, and thus did not affect whether a petition was "properly filed." Pet. App. 12a-13a.

The Sixth Circuit also determined that a Section 770.16 motion is an application for "collateral review." Pet. App. 14a-21a. On this score, the Court explained that a Section 770.16 motion is a motion for "new trial" that requires courts to engage in "collateral review with respect to the pertinent judgment or

claim." Pet. App. 14a-17a. Such a petition, when pending, tolls the habeas statute of limitations. Pet. App. 7a (citing 28 U.S.C. § 2244(d)(2)). As a result, Mr. Kares's properly filed Section 770.16 rendered his habeas petition timely.

The Sixth Circuit nonetheless denied Mr. Kares's habeas petition. It held that Mr. Kares had not established cause and prejudice to excuse any procedural default of his *Alleyne* claim. Pet. App. 22a-24a. Mr. Kares petitioned for rehearing, explaining that the Sixth Circuit failed to address whether he procedurally defaulted in the first place, determining only that, if he had, the procedural default could not be excused. PFR 3-16. After ordering Michigan to respond, the panel denied his motion for rehearing. Pet. App. 228a.

Despite the Sixth Circuit's ruling barring Mr. Kares from pursuing relief, Michigan petitioned this Court for certiorari.

ARGUMENT

I. This Court should not grant certiorari unless answering the question presented would affect the outcome of this case.

A grant of certiorari in this case would seem to be an obvious nonstarter. Resolving the question whether a motion under Section 770.16 tolls AEDPA's statute of limitations won't make a difference to Mr. Kares: The Sixth Circuit's procedural default holding means that Mr. Kares won't receive habeas relief whatever happens with the statutory tolling question. And it won't make a difference to Michigan: Mr. Kares will remain in prison however the statutory tolling question is resolved. Under ordinary Article III and

prudential principles, then, this petition should be an easy "deny."

Indeed, this Court has only thrice in its history granted certiorari to a party that won in the lower courts. The sum total of Michigan's argument for why this case should be the fourth consists of three sentences in a footnote. And the sole case it cites, *Camreta v. Greene*, 563 U.S. 692 (2011), is nothing like this one.

The only way to ensure that both parties have a stake in the lower court's decision—that is, the only way a grant of certiorari makes sense—would be if Michigan expressly waives reliance on procedural default and asks this Court to vacate that portion of the Sixth Circuit's opinion. That way, both Mr. Kares and Michigan would have an interest in this case at this junction: Should Mr. Kares win on the statutory tolling question, he'd get to litigate his (indisputably meritorious) *Alleyne* claim. Absent such a waiver, however, this Court should deny the petition for certiorari.

A. Unless Michigan is willing to waive reliance on procedural default, Article III and prudential considerations prevent this Court from granting certiorari.

So long as there is no possibility that Mr. Kares could benefit from this Court's ruling, this Court lacks jurisdiction. And, even if this Court had jurisdiction, prudential considerations counsel against granting a petition to a prevailing party.

1. Article III

Article III requires that the parties to a suit demonstrate a "personal stake in the outcome of the controversy." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (cleaned up). This ensures that courts "decide litigants' legal rights in specific cases." *FDA v. All. for Hippocratic Med.*, No. 23-235, 2024 WL 2964140, *5 (U.S. June 13, 2024). Per Article III, *both* parties must retain that stake for the duration of the proceedings. *Camreta*, 563 U.S. at 701-02, 710-11. Here *neither* party has a stake sufficient to confer jurisdiction, doubly barring review.

1. First, as long as the Sixth Circuit's procedural default holding precludes relief for Mr. Kares, he has no stake in the outcome of this petition for certiorari. Win or lose, Mr. Kares will continue to serve his sentence.

Indeed, Michigan does not even attempt to argue that this suit would redress any injury of Mr. Kares's. The closest it comes is citing to *Camreta*. In that case, this Court held that in some instances, it may review a lower court's constitutional ruling at the behest of a government official who prevailed on qualified immunity grounds. 563 U.S. at 702. Because "the person who initially brought the suit may again be subject to the challenged conduct," she may "ha[ve] a stake in preserving the court's holding." *Id.* at 703. Thus, in this "one special category of cases"—that is, qualified immunity cases—this Court excused itself from its "usual rule against considering prevailing parties' petitions." *Id.* at 709. And even in qualified

immunity cases, many plaintiffs still won't have the requisite Article III stake in the outcome. Indeed, in *Camreta* itself, this Court found that the plaintiff no longer had an Article III stake in the case because she had moved out of the State.

Camreta doesn't support Michigan's petition. Unlike in a qualified immunity case, "the person who initially brought the suit"—the habeas petitioner—is highly unlikely to "again be subject to the challenged conduct." *See id.* at 703. The odds of that habeas petitioner again being prosecuted, again being convicted, having a meritorious claim, and being stymied on habeas relief by the same procedural obstacle are impossibly slim. This Court has explained that just the first link in that chain—the possibility that someone be prosecuted in the future—is too "speculat[ive]" to confer Article III standing. *O'Shea v. Littleton*, 414 U.S. 488, 493-97 (1974).

And even if *some* habeas petitioner might have standing in a case like this one, Mr. Kares does not. Set aside the snowball's chance that Mr. Kares would ever be prosecuted again, ever be convicted again, and ever have a meritorious habeas claim again. The likelihood that Mr. Kares's federal habeas petition would only be timely if a motion under Section 770.16 qualifies for statutory tolling under AEDPA is next to zero. Indeed, Michigan has not pointed to *any* other case where this question made a difference to a habeas petitioner.

2. Standing alone, the fact that Mr. Kares has no stake in preserving the Sixth Circuit's decision would

be sufficient to defeat this Court's jurisdiction under Article III. But Michigan doesn't have a stake in the outcome of this case either. Although the Sixth Circuit rejected Michigan's argument on timeliness, an adverse determination on an issue that does not affect the final judgment does not suffice to confer jurisdiction. *See California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court reviews judgments, not statements in opinions." (cleaned up)).

Michigan argues that it has an ongoing stake in this case because the Sixth Circuit's decision will "affect every future habeas case involving this issue." Pet. 13 n.5. But even assuming that were sufficient to confer Article III standing, there is no reason to think that the Sixth Circuit's decision has any such impact: Michigan provides no evidence that it frequently—in fact that it *ever*—litigates habeas cases that may proceed only if a Section 770.16 motion tolls the statute of limitations. *Cf. Camreta*, 563 U.S. at 702-04.

Michigan's citation to *Camreta* does not help. *See* Pet. 13 n.5. In *Camreta*, this Court reasoned in the qualified immunity context that so long as the lower court's holding on the merits of the constitutionality of the conduct in question "remains good law, an official who regularly engages in the challenged conduct as part of his job" must either "change the way he performs his duties or risk a meritorious damages action." 563 U.S. at 703. By contrast, in this case, a state official won't have to change his primary conduct—"the way he performs his duties"—depending on whether a Section 770.16 motion tolls

AEDPA's statute of limitations. And Michigan does not argue to the contrary. *See* Pet. at 13 n.5.

Both parties must have an ongoing stake in the dispute for this Court to have jurisdiction. Here, neither party does.

2. Prudential considerations

Were the Constitution somehow to confer jurisdiction, prudential considerations would still weigh heavily against granting certiorari as long as the lower court's procedural default holding stands. "[E]ven when the Constitution allow[s it] to do so," this Court "generally decline[s] to consider cases at the request of a prevailing party." *Camreta*, 563 U.S. at 703-04. That is because this Court's "resources are not well spent superintending each word a lower court utters en route to a final judgment in the petitioning party's favor." *Id.* at 704. On the "few occasions" when this Court has "departed from that principle," it has "pointed to a policy reason of sufficient importance to allow an appeal by the winner below." *Id.* (cleaned up).

Michigan provides *no* "policy reason," let alone one of "sufficient importance," to depart from this Court's usual rule. Its sole response is a citation to *Camreta*. But *Camreta* placed "qualified immunity cases in a special category when it comes to this Court's review of appeals brought by winners." 563 U.S. at 704. And its reason for doing so—that qualified immunity cases "are self-consciously designed" to "have a significant future effect on the conduct of public officials" while also permitting courts to find officials immune from suit—doesn't apply here. *Id.* at 704-05. In the qualified immunity context, courts may issue constitutional determinations to advance the law even

though the Court's "usual adjudicatory rules suggest that a court should forbear resolving th[e] issue." *Id.* at 705-06 (italics omitted). And if this Court's "usual bar on review applied, it would undermine the very purpose served by" the qualified immunity doctrine, namely to "clarify constitutional rights without undue delay." *Id.* at 708 (cleaned up).

Habeas, by contrast, is not "self-consciously designed" to have a "significant future effect" on any public official's conduct or to clarify constitutional rights. *See supra*, 11-12. And so, there is no comparable exception to this Court's "usual adjudicatory rules" in the habeas context.

Indeed, there's no principled way to distinguish *this* case from the numerous others in which States might seek certiorari, even though they prevailed below—the case finding a warrant defective but allowing the prosecution to proceed based on the good-faith exception, the case finding a search unreasonable but declining to suppress because of inevitable discovery, the case finding error but concluding it wasn't plain, and so on.

As long as procedural default bars Mr. Kares from proceeding, this case is simply not one this Court should review.

B. If the Sixth Circuit's ruling on procedural default does not bar Mr. Kares's case from proceeding, there is no barrier to certiorari.

If procedural default does not prevent Mr. Kares from litigating his *Alleyne* claim, the jurisdictional and prudential barriers just discussed disappear. So,

if Michigan wishes this Court to grant certiorari, it must waive procedural default.

Procedural default is a waivable defense. *See Trest v. Cain*, 522 U.S. 87, 89 (1997); *Cone v. Bell*, 556 U.S. 449, 485 n. 6 (2009) (Alito, J., concurring in part and dissenting in part); *Maslonka v. Hoffner*, 900 F.3d 269, 276 (6th Cir. 2018); *Gumm v. Mitchell*, 775 F.3d 345, 376 (6th Cir. 2014); *Bledsue v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999).

And there would be good reason for Michigan to waive procedural default in this case: There was no default. Mr. Kares raised his *Alleyne* claim in state court consistent with Michigan's own procedural rules. The Sixth Circuit didn't even address whether Mr. Kares procedurally defaulted, concluding only that *if he did*, such a failure was not excused. *See* PFR 3-4.

II. Mr. Kares's habeas petition was timely filed.

Should Michigan waive the defense of procedural default, there would be no further obstacle to this Court's review, and Mr. Kares stands ready to defend the Sixth Circuit's statutory tolling decision. Recall that AEDPA's statute of limitations is tolled for "[t]he time during which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Michigan argues that Mr. Kares's Section 770.16 petition was not "properly filed," Pet. 27-35, and, even if it was, a Section 770.16 motion cannot toll the statute of limitations under AEDPA. 28 U.S.C. § 2244(d)(2), Pet. 15-26. Neither argument is persuasive.

A. The Sixth Circuit correctly concluded that Mr. Kares's Section 770.16 motion was "properly filed."

Mr. Kares's Section 770.16 petition was a "properly filed application" that tolled the AEDPA limitations period during its pendency. *See* OB 45-51. "[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (italics omitted). To be "properly filed," an application need not comply "with all mandatory state-law procedural requirements that would bar review of the merits." *Id.* Rather, as Michigan concedes, the application need only comply with those "requirements" which constitute "condition[s] to filing." *Id.* at 11; *see* Pet. 28. Conditions to filing "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." *Artuz*, 531 U.S. at 8 (footnote omitted). They are distinguishable from "condition[s] to obtaining relief," *id.* at 11, which get at whether relief is merited rather than whether the court is permitted to "consider th[e] petition" in the first place, *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).

Michigan argues that Section 770.16 has three "filing conditions" that Mr. Kares did not satisfy. Pet. 27. These are that (1) "DNA testing was done in [Mr. Kares's] case," (2) "the results of the testing were inconclusive," and (3) "testing with current DNA technology is likely to result in conclusive results." Mich. Comp. L. § 770.16(1). According to Michigan, these are conditions to filing because Section 770.16 states that someone "may petition" the trial court for

DNA testing only after meeting these conditions. Pet. 29-30.

But, contrary to Michigan's assertion, the statute's use of the phrase "may petition" confirms that the three conditions identified are *not* conditions to filing. To "petition" is not to "file." *See* 28 U.S.C. § 2244(d). Indeed, elsewhere in the very same statute, Section 770.16 uses the word "filed" in setting forth its sole condition to filing: "[a] petition under this section shall be *filed* in the circuit court for the county in which the defendant was sentenced." Mich. Comp. L. § 770.16(2) (emphasis added). No one has disputed that Mr. Kares satisfied *that* condition. And other Michigan statutes similarly use the word "file" when they mean to set out conditions to filing. *See, e.g.*, Mich. Comp. L. § 767A.2 ("The petition for authorization to issue 1 or more investigative subpoenas *may be filed* by the prosecuting attorney with any of the following . . ." (emphasis added)); Mich. Comp. L. § 780.621(1) ("[A] person who is convicted of 1 or more criminal offenses *may file* an application with the convicting court for the entry of an order setting aside 1 or more convictions as follows . . ." (emphasis added)); Mich. Comp. L. § 324.5505 ("[A] petition *may be filed* after that deadline only if the petition is based solely on grounds arising after the deadline for judicial review" (emphasis added)).

Moreover, the nature of the three conditions set forth in Section 770.16(1) indicate that they are conditions to obtaining relief, not conditions to filing. None relates to the "form" or "delivery and acceptance" of a Section 770.16 motion. *See Artuz,* 531 U.S. at 8. Instead, each relates to whether relief is ultimately merited. *See Pace*, 544 U.S. at 417.

Because Mr. Kares's Section 770.16 motion met the only filing condition required of it, it was "properly filed."

B. The Sixth Circuit correctly held that a Section 770.16 motion is an application for "collateral review."

Mr. Kares's Section 770.16 petition was also an application "for post-conviction or other collateral review" within the meaning of AEDPA's statutory tolling provision. 28 U.S.C. § 2244(d)(2); *see* OB 52-63. "[C]ollateral review" is defined as "a "judicial reexamination of a judgment or claim in a proceeding outside of the direct review process." *Wall v. Kholi*, 562 U.S. 545, 553 (2011). No one disputes that Mr. Kares's Section 770.16 petition was "outside of the direct review process." But Michigan disputes whether it mandated "judicial reexamination of a judgment or claim." It did.

A Section 770.16 motion requires a court to "reexamin[e]" the underlying judgment—several times. Before ordering DNA testing under Section 770.16, a court must determine whether the testing would be "material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction." Mich. Comp. L. § 770.16(4)(a). Identifying which facts are "material" requires "reexamin[ing]" the facts and law that led to the judgment in the case. *See, e.g.*, *People v. Poole*, 874 N.W.2d 407, 412-13 (Mich. Ct. App. 2015) (analyzing trial record). Thus, from the outset, a Section 770.16 motion requires a court to "reexamin[e]" the underlying "judgment." The court must engage in a further reexamination of the judgment if the DNA testing shows that the defendant

is not the source of the biological material tested. At that stage, the court must "balance[]" any new DNA evidence "against the other evidence in the case." Mich. Comp. L. § 770.16(8)(c). This, too, requires the court to analyze the facts of the case and how they bear on the defendant's conviction—a textbook "reexamination" of the underlying "judgment."

Indeed, more than just a "review" of the underlying judgment, a Section 770.16 proceeding is a collateral attack on that judgment. This Court has made clear that new trial motions qualify as "application[s] for postconviction or other collateral review" under 28 U.S.C. § 2244(d)(2). *Wall*, 562 U.S. at 553, 556 n.4. And, as the Sixth Circuit rightly found, a Section 770.16 motion is a motion for new trial. Pet. App. 18a. Chapter 770 of the Michigan Compiled Laws—in which Section 770.16 is contained—is the chapter for "*New Trials*, Writs of Error, and Bills of Exceptions." Mich. Comp. L. § 770.16(8) (emphasis added.) Filing a single Section 770.16 motion is sufficient to trigger first DNA testing, then a hearing, and eventually a new trial, as warranted. *Id.*

Michigan argues that only the new trial "phase" of the motion, and not the DNA testing "phase," tolls the AEDPA statute of limitations. Pet. 15-26. Not so, for at least two reasons. First, procuring an order for DNA testing itself requires a "reexamination" of the underlying judgment. Section 770.16 demands that courts determine, prior to testing, whether the testing would be "material to the issue of the convicted person's identity as the perpetrator" of the alleged crime. *See* Mich. Comp. L. § 770.16(4)(a). So the DNA testing "phase" of a Section 770.16 proceeding also

entails a "collateral review with respect to the pertinent judgment." *See* 28 U.S.C. § 2244(d)(2).

Second, the text of AEDPA makes clear that its statute of limitations is tolled while a "properly filed *application*" for collateral review "is pending" in state court. 28 U.S.C. § 2244(d)(2) (emphasis added). It doesn't suggest that tolling only occurs during some particular "phase" of the adjudication of that application.[2] And that focus on the application itself makes good sense: federal courts can easily monitor whether state petitions are filed and pending. Michigan's proposed alternative—that tolling turns on "phases" of state proceedings or "inquiries" conducted by state courts—is not only atextual but unworkable. Perhaps unsurprisingly, Michigan does not point to a single ruling issued by any court holding that AEDPA requires such a setup.

Furthermore, there are myriad motions that indisputably toll the statute of limitations at the time of filing even if they proceed in multiple "phases." Consider, for instance, Michigan's state habeas process. Everyone agrees that a filing of a Rule 6.502 motion—Michigan's standard postconviction vehicle—tolls the statute of limitations. But Michigan

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[2] Michigan, citing *Poole*, argues that the state courts prohibit "conflat[ing]" the DNA testing component of a Section 770.16 motion with the new trial portion. Pet. 23 (citing 874 N.W.2d at 414). But *Poole* had nothing to do with AEDPA or the question of when "collateral review" begins. 874 N.W.2d at 407. Rather, *Poole* held only that the two pieces of Section 770.16 must not be conflated for the purpose of "deny[ing] DNA testing on the basis that a court concludes that it would deny a future motion for new trial regardless of the results of any DNA testing." *Id.* at 414.

rules require a court reviewing a Rule 6.502 motion to decide first whether it "plainly appears from the face of the materials . . . that the defendant is not entitled to relief." Mich. Ct. R. 6.504(B). Only *later* may the court grant relief from the underlying judgment. But no one disputes that a Rule 6.502 motion tolls the AEDPA statute of limitations at filing.

Finding no foothold in the statute itself, Michigan resorts to policy arguments. It claims that allowing a Section 770.16 motion to toll AEDPA's statute of limitations "has significant potential for abuse," because a Michigan prisoner can file multiple Section 770.16 motions. Pet. 26. But Michigan never explains why a prisoner would have an incentive to continue to file Section 770.16 motions—that is, why he would choose to delay the day he can proceed to federal habeas review. And Michigan ignores the countervailing policy considerations that the AEDPA tolling provision is designed for: namely to "permit" and "incentiv[ize]" exhaustion of "all available state remedies." *Wall*, 562 U.S. at 558 (italics omitted).[3]

In any event, all of those policy considerations are beside the point. However Michigan would choose to write the statute, Congress has chosen to provide tolling any time a "properly filed application for . . .

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[3] Michigan also argues that a Section 770.16 motion should not toll the AEDPA statute of limitations at all because there are other mechanisms, such as equitable tolling and other provisions of AEDPA, that might make a habeas petition timely if DNA evidence exonerates a prisoner. Pet. 24-25 & n.7. But the availability of other avenues does not permit a court to read out of Section 2244(d)(2) that latter provision's clear instruction to toll the statute of limitations when a new trial motion like Section 770.16 is pending.

collateral review" is pending. The Sixth Circuit correctly held that such an application was pending here.

CONCLUSION

The Court should grant certiorari only if Michigan waives procedural default and this Court is willing to vacate the Sixth Circuit's ruling on that issue. In that case, Mr. Kares is prepared to defend the Sixth Circuit's ruling that his habeas petition was timely filed.

Respectfully submitted,

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