No. 23-942

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

REPLY BRIEF

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INTRODUCTION

> That the victor has filed the appeal does not deprive us of jurisdiction.

Camreta v. *Greene*, 563 U.S. 692, 703 (2011).

The State ostensibly prevailed below, but not in the traditional manner. Though Stephen Kares did not receive habeas relief, the Sixth Circuit deemed his petition timely. If that decision had resulted from a straightforward application of facts to existing law, the State likely would not be here. But that is not what happened.

The Sixth Circuit held in a published decision that *all* Michigan habeas petitioners are entitled to tolling under 28 U.S.C. § 2244(d)(2) if they properly file a state motion for post-conviction DNA testing. Despite the State's status as the victor in the judgment, jurisdiction is proper both constitutionally and prudentially as this is the State's only opportunity to challenge that precedential ruling.

Upon reaching the merits, this Court will see that Kares did not properly file his state DNA motion to warrant tolling, and that, more generally, such motions solely seek discovery material and do not call for a judicial reexamination of the judgment, as required under *Wall*, unless and until exculpatory DNA results are obtained.

ARGUMENT

I. Jurisdiction is constitutional and prudent in this Court notwithstanding that the State prevailed in the judgment below.

Kares exhorts lack of jurisdiction because the State prevailed below. Br. in Opp. at 8. But that is not a barrier to jurisdiction, as the Sixth Circuit's decision has consequences for both parties, as well as all future habeas petitioners. Further, this Court's intervention would be most prudent because this is the State's only opportunity to challenge the Sixth Circuit's adverse published decision. And there is no need for the State to waive the procedural-default defense to Kares's claim under *Alleyne* v. *United States*, 570 U.S. 99 (2013), to clear the way for jurisdiction.

A. This Court may grant jurisdiction to a prevailing party.

Jurisdiction involves two distinct principles, one constitutional, the other prudential. *United States* v. *Windsor*, 570 U.S. 744, 756 (2013). Kares challenges both, Br. in Opp. at 9, 12, but neither bars review.

1. This Court has constitutional jurisdiction to vacate the Sixth Circuit's adverse timeliness decision.

The first principle is constitutional under Article III, requiring a case or controversy in which both parties have standing, i.e., personal stakes, in the case. *Windsor*, 570 U.S. at 757. This requires injury, causation, and redressability. *Camreta*, 563 U.S. at 701.

This Court has "previously recognized that an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement." *Id.* at 702. Congress has "confer[red] unqualified power on this Court to grant certiorari 'upon the petition of *any* party.' " *Id.* at 700 (quoting 28 U.S.C. § 1254(1) (emphasis applied by the Court)). "That language covers petitions brought by litigants who have prevailed, as well as those who have lost, in the court below." *Id.*

Kares contends that this has happened "only thrice" in the Court's history, Br. in Opp. at 8, but that is incorrect. In *Camreta*, the Court identified two previous times it granted jurisdiction to prevailing parties. 563 U.S. at 702 (citing *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326 (1980), and *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939)). The Court has taken that action at least twice more since *Camreta*—in *Windsor*, 570 U.S. at 758 (also citing a "comparable case" from 1983, *INS* v. *Chadha*, 462 U.S. 919 (1983)), and *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, 591 U.S. 197, 212 (2020) (citing *Windsor*, 570 U.S. at 758). See also *Forney* v. *Apfel*, 524 U.S. 266, 271 (1998) ("A party is aggrieved and ordinarily can appeal a decision granting in part and denying in part the remedy requested." (cleaned up)).

Kares tries to cabin the prevailing-party scenario to qualified-immunity cases like *Camreta*. Br. in Opp. at 9–13. But this Court has never been so shortsighted. Proceeding chronologically, *Electrical Fittings* involved patent infringement, *Roper* involved a financial class-action lawsuit, *Windsor* involved death benefits for a same-sex couple, and *Seila Law* involved

the constitutionality of a federal agency. Also, *Chadha* was a deportation case and *Forney* was a Social Security disability case. The prevailing-party scenarios run the gamut.

Based on the foregoing authorities, both Kares and the State have personal stakes to satisfy Article III. And even if Kares does not have a stake, as he stresses, then the Sixth Circuit's timeliness decision is moot and should be vacated, as in *Camreta*.

Begin with the State. The State has suffered an injury in fact—Kares and all future petitioners are entitled to statutory tolling during the pendency of motions for post-conviction DNA testing. There is also a causal link between the tolling Kares received and the timeliness of his petition. Finally, the error is redressable as this issue is likely to resurface given that defendants will keep filing DNA motions and the State answers hundreds of habeas petitions every year. See *Camreta*, 563 U.S. at 703 (finding jurisdiction where the prevailing party "regularly engages in that conduct"). Kares retorts that the timeliness decision did not affect the final judgment. Br. in Opp. at 11. But it did, because if Kares's petition had *not* been timely, the case would have ended there. Since the Sixth Circuit considered it timely, however, that court also considered whether to expand the certificate of appealability (COA). That the Sixth Circuit declined to do so did not defeat federal jurisdiction.

Move next to Kares. He has suffered an injury in fact as well: the Sixth Circuit denied his request to expand the COA. There is also causation and redressability because Kares, just like every other citizen, could be convicted of a crime and seek post-conviction

DNA testing, which would in turn toll his habeas petition. This possibility is similar to the plaintiff in *Camreta*, who "may again be subject to the challenged conduct" of a warrantless search and thus retained "a stake in preserving the court's holding." 563 U.S. at 703.

But if Kares is correct that he lacks the requisite stake, then the timeliness of his habeas petition is effectively mooted by his decision not to challenge the Court's resolution of the default question and the COA, and the Sixth Circuit's decision on the issue of timeliness should be vacated. That is the remedy this Court employed in *Camreta*, where the constitutional issue had become moot given that the plaintiff moved out of the affected jurisdiction. 563 U.S. at 710–11. The "necessity of that procedural course" was plain to "prevent an unreviewable decision 'from spawning any legal consequences,' " preventing either party from being harmed by a " 'preliminary' adjudication.' " *Id*. (quoting *United States* v. *Munsingwear*, *Inc.*, 340 U.S. 36, 40–41 (1950)).

In either case, this Court has jurisdiction.

2. This Court's intervention is prudent.

The second jurisdictional principle is prudential, which "embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Windsor*, 570 U.S. at 757 (cleaned up). These are "more flexible rules of federal appellate practice designed to protect the courts from deciding abstract questions of wide public significance" asserted by parties who technically have Article III standing but are only tangentially affected by

the challenged conduct. *Id*. (cleaned up) (citing *Warth* v. *Seldin*, 422 U.S. 490, 499–500 (1975)).

The general rule limiting appeals to aggrieved parties "is one of federal appellate practice" and thus falls into the prudential category; "it does not have its source in the jurisdictional limitations of Art. III." *Roper*, 445 U.S. at 333–34. See also *Camreta*, 563 U.S. at 703–04. Thus, "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Roper*, 445 U.S. at 334. See also *Windsor*, 570 U.S. at 757–58 (granting jurisdiction to prevailing parties on prudential grounds) and *Seila Law*, 591 U.S. at 212 (same).

This Court's intervention in this case is not only prudent but pivotal because this is the State's only opportunity to meaningfully challenge the Sixth Circuit's sweeping, binding decision. After this, the State's only recourse will be, in future cases, to implore the Sixth Circuit—en banc—to overrule *Kares*. Otherwise, the State must "acquiesce in a ruling [it] had no opportunity to contest in this Court" solely because it was the prevailing party. *Camreta*, 563 U.S. at 708.

Further, the State did not prevail in this case in the usual manner or by any fault of its own. This case is peculiar because the district court limited the COA to the timeliness issue and the Sixth Circuit declined to expand it to include the *Alleyne* claim, preventing any merits review. Disallowing the State to petition this Court simply because it prevailed in this odd

posture would unfairly insulate the Sixth Circuit's decision from any review. Nor is this a mere matter of wordsmithing or policing statements in opinions. Br. in Opp. at 11–12. The Sixth Circuit held that an entire class of state motions will automatically toll the habeas limitations period in *every* case, with the only precondition being that the motion is filed in the right trial court. App. 12a. That decision is "[n]o mere dictum." *Camreta*, 563 U.S. at 708.

Thus, prudence militates in favor of jurisdiction.

B. The State is not required to waive a legitimate procedural default.

Kares further argues that the only way to confer jurisdiction on this Court is for the State to waive its procedural-default defense. Br. in Opp. at 13–14. Not so, for two reasons.

First, Kares *did* default his *Alleyne* claim. He failed to present it on direct appeal or at the first level of state post-conviction review. See *Gray* v. *Netherland*, 518 U.S. 152, 161–62 (1996) (holding that if the petitioner fails to present his claims to the state courts but has no remaining state remedy, the claims are considered exhausted but procedurally defaulted). In fact, in the Sixth Circuit, the debate was not even whether Kares defaulted his *Alleyne* claim but only whether the default could be excused by alleged ineffective assistance of appellate counsel. App. 22a. The Sixth Circuit held that it could not because that claim was itself defaulted for failure to exhaust it. *Id.* at 23a–24a. Far from sheer technicalities, these issues go to the heart of state and federal comity.

Second, the procedural default is not the key to jurisdiction here. Even if the COA had been expanded, which would have given the Sixth Circuit jurisdiction to fully address the *Alleyne* claim, the Sixth Circuit still could have denied it on default grounds. And the default analysis was necessary. A federal court *cannot* grant habeas relief on a defaulted claim. *Magwood* v. *Patterson*, 561 U.S. 320, 340 (2010). Thus, if habeas relief is on the table, the court *must* first address procedural default. *Engle* v. *Isaac*, 456 U.S. 107, 129 (1982).

In sum, this Court has constitutional jurisdiction under Article III, and the prudential concerns bolster that jurisdiction.

II. Motions for post-conviction DNA testing do not meet the requirements for statutory tolling as they merely seek discovery unless and until exculpatory test results are obtained.

Kares presents narrow arguments on the merits. He does not even challenge the circuit split. By and large, he simply echoes the Sixth Circuit's reasons for tolling. Those reasons suffer from several deficiencies.

A. Kares did not properly file his DNA motion.

Kares's sole retort to the State's argument that Michigan Compiled Laws § 770.16(1) outlines the filing conditions to warrant tolling under § 2244(d)(2) is semantical. Br. in Opp. at 16. He contends that the conditions under § 770.16(1) go to relief, not filing,

because the statute introduces them with the phrase "may petition," rather than "may file," which is used in § 770.16(2) to specify the court in which to file the DNA motion. *Id*.

This repeats the Sixth Circuit's rather perfunctory conclusion that these magic words silo the only filing condition in subsection (2). See App. 13a. The Sixth Circuit's sole reasoning was that use of "particular language in one section of a statute but omit[ting] it in another" is an intentional distinction by the legislature. *Id*. (quoting *Dean* v. *United States*, 556 U.S. 568, 573 (2009)). Yet, the Sixth Circuit concluded differently in a case it cited in *Kares*. In *Board* v. *Bradshaw*, 805 F.3d 769, 775 (6th Cir. 2015) (cited at App. 11a–12a), the court analyzed whether a delayed-appeal motion under Ohio Rule of Appellate Procedure 5(A) statutorily tolls a habeas petition. That rule specified *where* to file the motion ("shall be filed with the court of appeals") and the *pleading* requirements for the motion ("and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right"). The Sixth Circuit classified *both* as filing conditions. *Id*. Similarly, § 770.16(2) specifies where to file the DNA motion and § 770.16(1)—which, obviously, *precedes* subsection (2)—specifies the pleading requirements. Both are filing conditions.

Filing requirements are not merely a matter of getting the motion to a clerk. See Br. in Opp. at 16. The Court rejected that argument in *Pace* v. *DiGuglielmo*, 544 U.S. 408, 414 (2005), noting that clerks are not the only arbiters of proper filings and that sometimes judicial scrutiny is required. Here, the state trial court found that Kares failed to meet the

pleading requirements under § 770.16(1). The court concluded that Kares "has not shown that he qualifies to petition this Court to order DNA testing," nor did he "make the showing required for him to file a motion under MCL 770.16." App. 207a–208a. The trial court treated the subsection (1) requirements as filing conditions.

Michigan's DNA statute at once states the threshold pleading requirements in subsection (1) and then specifies the court where the motion must be filed in subsection (2). Together, they constitute the filing conditions for such a motion. Kares fell short. Thus, his motion was not properly filed and could not statutorily toll the limitations period.

B. Absent an exculpatory DNA test result, a motion for DNA testing does not compel judicial reexamination of the judgment.

Kares also resists the State's argument that § 770.16 does not call for a judicial reexamination of the judgment under *Wall* v. *Kholi*, 562 U.S. 545, 553 (2011), unless and until DNA testing is conducted and an exculpatory result obtains. Br. in Opp. at 17–18. But despite his insistence that § 770.16(1) is a relief provision rather than a filing provision, it does not call for judicial reexamination whatsoever. The three conditions in subsection (1) are pleading requirements to have a motion heard. The state trial court cannot even consider ordering DNA testing—let alone weigh the propriety of a new trial—unless those bases are pled. Kares failed to do so. App. 207a–208a.

Subsection (4) of § 770.16 is an unavailing intermediate step between initiation (subsection (1)) and a potential new-trial inquiry (subsection (8)). While subsection (4) requires any testing to be material to identity, it examines only whether DNA testing should be ordered. It does not *reexamine* the underlying *judgment*.

The State does not dispute that § 770.16(8) *eventually* allows for a reexamination of the judgment. But it cannot occur until *after* the necessary discovery. Judicial reexamination takes place *only if* the defendant properly pleads under subsection (1) *and* merits testing under subsection (4) *and* obtains an exculpatory result. Those sequential steps provide discovery material, which can *then* be used to reexamine the judgment. Compare this to a motion for relief from judgment under Michigan Court Rule 6.502. Even if such a motion also proceeds in "phases" and yet tolls upon filing, as Kares purports, Br. in Opp. at 19–20, those motions are fundamentally different because their very purpose is to reexamine the judgment. Mich. Ct. R. 6.502(A) ("The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment.").

Further countenancing against Kares's position is that he could not even get to judicial reexamination of his judgment. See App. 207a–208a. He is the perfect example of why DNA motions categorically fail to satisfy the reexamination requirement *unless* and *until* an exculpatory test result is obtained. The habeas limitations period should instead then commence under 28 U.S.C. § 2244(d)(1)(D), on "the date on which the factual predicate of the claim or claims presented

could have been discovered through the exercise of due diligence," rather than relying on tolling. And even if tolling is the proper path, it should be *equitable* tolling, as that will ensure that only deserving petitions are timely for review.

Otherwise, all DNA motions will automatically toll, a process rife with potential for abuse. Kares doubts this, asking "why [a petitioner] would choose to delay the day he can proceed to federal habeas review." Br. in Opp. at 20. Yet, if there was no such incentive, Congress would not have enacted the one-year statute of limitations. This Court has said as much: a petitioner "could toll the statute of limitations at will" by continually filing state motions, which "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." *Pace*, 544 U.S. at 413.

Ultimately, this is not a matter of the State preferring to "write the statute" differently. Br. in Opp. at 20. It is about proper application and interpretation of § 2244(d) as written. And as written, post-conviction motions for DNA testing—in any State—are merely motions for discovery that do *not* invoke judicial reexamination of the judgment absent an exculpatory test result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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