No. 24A____

In the Supreme Court of the United States

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, DIRECTOR,

Applicant,

v.

KAYLA JEAN AYERS,

Respondent.

APPLICATION TO RECALL AND STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PENDING RESOLUTION OF THE DIRECTOR'S PETITION FOR A WRIT OF CERTIORARI

DAVE YOST
Attorney General of Ohio

T. ELLIOT GAISER*
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
JANA M. BOSCH
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
thomas.gaiser@OhioAGO.gov

Counsel for Applicant

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Ayers*, 2013-Ohio-5402 (5th Dist.).

2. *State v. Ayers*, 2022-Ohio-1910 (5th Dist.), *appeal not allowed*, 167 Ohio St. 3d 1528 (2022).

3. *Ayers v. Ohio Dep't of Rehab. & Corr.*, No. 5:20-CV-1654, 2023 WL 4931928 (N.D. Ohio Aug. 2, 2023).

4. *Ayers v. Ohio Dep't of Rehab. & Corr.*, 113 F.4th 665 (6th Cir. 2024).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

The Director of the Ohio Department of Rehabilitation and Correction is filing this application to request that the Court recall and stay the mandate of the United States Court of Appeals for the Sixth Circuit. In the proceedings below, the Sixth Circuit held that a new expert report based on a previously-available claim can restart the clock for filing a habeas petition that is otherwise untimely by years. App.7–9. The Sixth Circuit compounded its error by refusing to stay its mandate pending the disposition of the Director's pending certiorari petition, even though Ayers did not oppose. App.14; *see* Cert. Pet., *Chambers-Smith v. Ayers*, No. 24-584 (U.S. Nov. 25, 2024).

Because the Sixth Circuit refused to stay its mandate, the Director moves this Court to recall and stay the Sixth Circuit's mandate while the petition pends.

PARTIES TO THE PROCEEDINGS BELOW

Applicant Director of the Ohio Department of Rehabilitation and Correction was Respondent in the United States District Court for the Northern District of Ohio and Appellee in the United States Court of Appeals for the Sixth Circuit.

Respondent Ayers was Petitioner in the United States District Court for the Northern District of Ohio and Appellant in the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The District Court dismissed Ayers's petition for a writ of habeas corpus for untimeliness on August 2, 2023. *Ayers v. Ohio Dep't of Rehab. & Corr.*, No. 5:20-CV-

1654, 2023 WL 4931928 (N.D. Ohio Aug. 2, 2023). On July 25, 2024, the Sixth Circuit reversed the District Court and remanded for further proceedings. App.2. The Sixth Circuit's opinion is published at *Ayers v. Ohio Dep't of Rehab. & Corr.*, 113 F.4th 665 (6th Cir. 2024). The Sixth Circuit denied the State's motion to stay the mandate on October 8, 2024. App.14. It issued the mandate on October 16, 2024. App.15.

JURISDICTION

This Court has jurisdiction to review the Sixth Circuit's order denying a stay of the mandate under Supreme Court Rules 22 and 23 and 28 U.S.C. §2101(f).

STATEMENT OF THE CASE

I. A jury convicted Ayers of aggravated arson and child endangerment.

Ayers lived with her father, along with her toddler son and her father's family. App.3. She did not want her father to leave, and she told him she would burn the house down if he did. App.3. Hours after he announced his plans to leave, she lit a mattress on fire. *Id.* When the fire department put out the fire, she had a story of how it happened—two stories, actually. App.3–4. First, she told them that her son had lit the mattress on fire while she was doing laundry. *Id.* Then she changed her mind and said she had fallen asleep with a cigarette on the bed. *Id.* Then she switched back to her first story and stuck to it. *Id.*

Along with other evidence at trial, the State presented expert testimony from the fire inspector, Reginald Winters. App.4. He testified that the mattress appeared to have two "ignition points," suggesting that someone had lit the mattress twice at two different locations. *Id.* That meant Ayers's story about her child igniting the mattress was less plausible. *Id.* Ayers's counsel attempted to impeach Winters by

pointing out inconsistencies in his reports and his testimony, but he did not consult an arson expert or question Winters's qualifications. App.4–5. The jury convicted, and the court sentenced her to seven years' imprisonment and three years of post-release control. App.5.

II. Ayers appealed and filed motions seeking relief.

Ayers appealed her conviction, claiming that it was against the manifest weight of the evidence, that the verdict lacked sufficient evidence, and that her counsel was ineffective for relying on Winters's draft report in preparing for trial and for failing to cross-examine Winters more about his errors in his draft report. *State v. Ayers*, 2013-Ohio-5402, ¶¶15–16, 29 (5th Dist.). She lost, and her window for seeking further direct review expired in 2014. *Id.* at ¶¶28, 34.

In the following years, Ayers filed a raft of pro se motions. She sought appointment of counsel to try to find "additional evidence." *State v. Ayers*, 2022-Ohio-1910, ¶22 (5th Dist.). She filed six motions and a letter regarding her court costs. *Id.* at ¶¶23–25, 28, 29, 31, 32. And she filed three motions to reduce her sentence. *Id.* at ¶¶26, 27, 33. Finally, with counsel from the Innocence Project, she moved for a new trial in 2020, about five years after the habeas deadline had run. *Id.* at ¶34.

Ayers's new-trial motion used a 2019 affidavit of John Lentini to attack the State's expert. Lentini wrote that Winters's testimony was unreliable because it was "unsupportable by any generally accepted methodology," based on circular reasoning, and inconsistent with the standards Winters used to analyze the fire. *Id.* at ¶35. He also opined that Winters was unqualified to investigate the fire. *Id.* The state courts rejected her motion. *Id.* at ¶124.

Ayers also filed a habeas petition. Relevant here, she claimed that her trial counsel had been "ineffective for failing to consult with an expert witness regarding the origin of the fire and for failing to challenge the State's purportedly false expert testimony." *Ayers*, 2023 WL 4931928, at *2. The District Court held that Ayers's petition was untimely by several years. *Id.* at 3. It also found that Ayers had not shown her entitlement to a delayed-start clock for her habeas petition—she did not present a new factual predicate that she could not have discovered beforehand. *Id.* at 4. Ayers argued that she would have needed an expert to tell her that her counsel was ineffective for not hiring an expert. *Id.* at 6. The District Court pointed out that Ayers "seem[ed] to simultaneously argue that her counsel was clearly ineffective for failing to consult with an expert" and "that there was no way for anyone, including trial counsel, to understand that Winters' testimony was deficient without the assistance of an expert." *Id.* at 7. It dismissed the petition as untimely. *Id.* at 11.

The Sixth Circuit reversed. It started by stating that a "factual predicate" is any fact that is "vital" to the petitioner's claim, meaning it supports the case enough to avoid sua sponte dismissal. App.7. Next, it decided that the 2019 expert report by Lentini "establishes the factual predicate for her ineffective-assistance claim" because the statements in the report "could have resulted in Ayers's acquittal" if her counsel had used them at trial. *Id.* Or to put it another way, Ayers's attorneys could have "retained an arson expert to testify" to the same facts as the Lentini report and "could have used that evidence to discredit Winters's testimony," which would have created "a reasonable probability Ayers would have been acquitted." App.8. That

meant, according to the panel, that "Lentini's report provides the factual predicate for Ayers's claim because it provides facts supporting the claim's merits such that a court would not dismiss it sua sponte." *Id.*

The Sixth Circuit rejected the State's argument that all these facts were discoverable long ago—indeed, before trial—with reasonable diligence. It reasoned that Ayers could not have "discovered Lentini's expert opinions without him providing them in the report," which "was not readily available" because no other source could have told Ayers what Lentini thought about the evidence. App.8–9. It also wrote that Ayers could not have discovered the factual predicate earlier because "the expert report Ayers needed to make her claim was not in the prison library," and "[n]o amount of diligent research through publicly available sources would have shown her that Winters was unqualified." App.10. It reversed and remanded to the District Court. App.12.

The Director sought a stay of the mandate, which the panel rejected. App.14. The Court issued the mandate on October 16, 2024. App.15.

REASONS TO GRANT THE APPLICATION

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases, the Circuit Justice or the Court will balance the equities and weigh the relative harms to the

applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

I. There is a reasonable probability that the Court will grant certiorari.

The Court is likely to grant certiorari in this case because it deepens a circuit split that implicates important federalism protections in AEDPA.

A. The Sixth and Ninth Circuits are split with the First, Second, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits.

A person in state custody generally has one year to file a habeas petition. Usually, that one year runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. §2244(d)(1)(A). But AEDPA restarts the clock in certain limited circumstances. Relevant here, the clock restarts when a new "factual predicate" "could have been discovered through the exercise of due diligence." §2244(d)(1)(D). When a prisoner obtains new support for a previously-available claim, does that mean she has a new "factual predicate" that restarts her clock? In the Sixth and Ninth Circuits, the answer is "yes." In the First, Second, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh, the answer is "no."

The Eighth Circuit, for example, held that the factual predicate for an ineffective-assistance claim is counsel's failure itself, not an understanding of the "legal significance" of the failure. *Martin v. Fayram*, 849 F.3d 691, 696 (8th Cir. 2017). Thus, a claim based on "trial counsel's failure to object" is based on a factual predicate of which the defendant is "already aware … by the conclusion of the trial"—namely, that counsel did not object. *Id.* Later understanding of "the legal significance of these

facts" or a desire to "develop additional evidence" does not replace the factual predicate or refresh the clock. *Id.* at 697.

Seven other circuits have weighed in on the Eighth Circuit's side of the split. The Tenth Circuit has held that the "factual predicate" of a claim based on alleged perjury at trial "is that [the witness] lied when he testified," since the defendant "knew or should have known that [the] testimony was false when he heard [the witness] testify to something [the defendant] knew to be untrue." *Taylor v. Martin*, 757 F.3d 1122, 1124 (10th Cir. 2014). The factual predicate was not the fact that the witness "swore out an affidavit" admitting perjury later. *Id.* The Second Circuit has likewise explained that an expert report "that merely supports or strengthens a claim that could have been properly stated without the discovery" is "not a 'factual predicate' for purposes of triggering the statute of limitations." *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012); *see also Holmes v. Spencer*, 685 F.3d 51, 59 (1st Cir. 2012); *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007); *Flanagan v. Johnson*, 154 F.3d 196, 197 –99 (5th Cir. 1999); *Johnson v. McBride*, 381 F.3d 587, 588–89 (7th Cir. 2004); *Cole v. Warden, Georgia State Prison*, 768 F.3d 1150, 1156–57 (11th Cir. 2014). In short, the one-year limitations period "begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance," because using a subjective standard would leave "no effective time limit." *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000), *as amended* (Jan. 22, 2001).

The Ninth Circuit goes the opposite way. It held that the factual predicate for an ineffective-assistance claim includes both the failures themselves and an

understanding of the "resulting prejudice." *Hasan v. Galaza*, 254 F.3d 1150, 1154 (9th Cir. 2001). In *Hasan*, the defendant knew "at the time of trial of some facts to support an assertion that his trial counsel's performance was deficient to an extent," and "he knew at that time that there may have been jury tampering and that his counsel did not properly investigate it or request a continuance to do so." *Id.* at 1154. But he did not know "the added facts that such an investigation would have revealed," namely, a "romantic relationship between" a prosecution witness and a person who tried to tamper with the jury. *Id.* That meant, the court said, that the petitioner could not have known the significance of his counsel's failure, so the clock did not start until the evidence of the relationship came to light. *Id.*

The Sixth Circuit has now joined the Ninth in permitting petitioners to present later-acquired support as the new "factual predicate." Here, Ayers based her claim on her counsel's pre-trial and at-trial actions. But instead of identifying the alleged ineffective assistance itself as the factual predicate, the Sixth Circuit held that the "factual predicate" was the later-obtained expert report that Ayers argued counsel should have obtained before trial. App.7–8.

This Court has not had occasion to discuss the factual-predicate provision. It cited it in *McQuiggin v. Perkins*, which analyzed whether actual innocence is an exception to the time limits in AEDPA. 569 U.S. 383, 386 (2013). Although it did not comment on the factual-predicate exception, it seemed to accept the district court's holding that affidavits attacking the trial-court testimony did not qualify as "newly discovered

evidence" because "the information contained in the three affidavits" was "substantially available to [the petitioner] at trial." *Id.* at 400. (quotation omitted).

B. The split implicates important federalism questions.

The split warrants this Court's attention because it raises an important issue about AEDPA's limits on habeas review. "Federal habeas review of state convictions entails significant costs, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Davila v. Davis*, 582 U.S. 521, 537 (2017) (internal citation and quotation omitted). AEDPA's one-year time limit should support the States' "well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). But the Sixth and Ninth Circuit's position revives the stalest of habeas cases. By the time a habeas petitioner raises her long-overdue claim, the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle v. Isaac*, 456 U.S. 107, 127–28 (1982). Other circuits have noted the damage that this loophole can create. *See, e.g.*, *Rivas*, 687 F.3d at 535. In short, if the deadlines are as manipulable as the Sixth and Ninth Circuits posit, the deadlines "might as well not exist." *Owens*, 235 F.3d at 359.

Moreover, misconstruing the term "factual predicate" impacts provisions in AEDPA as well. The restriction on "second or successive" habeas petitions depends on whether "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)(i). AEDPA also limits federal courts' ability to hold an evidentiary hearing unless the petitioner's failure to develop a state-court record was because the "factual predicate … could not

have been previously discovered through the exercise of due diligence." 28 U.S.C. §2254(e)(2)(A)(ii). Courts normally interpret matching terms in neighboring provisions to mean the same thing. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). So courts interpreting one of the three provisions referring to the "factual predicate" may draw on the other two for guidance. *See Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 287–88 (3d Cir. 2021). And insofar as the interpretation of the term "factual predicate" in those provisions bears on this case, the Sixth Circuit's ruling here breaks from other circuits on that front as well. *See, e.g.*, *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358–59 (11th Cir. 2007) (interpreting 28 U.S.C. §2244(b)(2)(B)(i)); *In re Davila*, 888 F.3d 179, 185 (5th Cir. 2018) (same); *Henry v. Ryan*, 720 F.3d 1073, 1085 (9th Cir. 2013) (interpreting 28 U.S.C. §2254(e)(2)(A)); *Newbury v. Stephens*, 756 F.3d 850, 869 (5th Cir. 2014) (same). It also would threaten to undermine this Court's recent precedents interpreting and applying the limits on new evidentiary hearings and their attendant procedures. *See Shinn v. Ramirez*, 596 U.S. 366, 381 (2022); *Shoop v. Twyford*, 596 U.S. 811, 820 (2022).

II. There is a fair prospect that this Court will reverse the judgment below.

The Court is also likely to reverse the Sixth Circuit because it egregiously erred in applying the time limits in AEDPA.

First, new support for a previously available claim is not a reason to restart the clock under AEDPA. The limitations provision permits petitioners to start the one-year clock when "the factual predicate of the claim" could have been discovered, not when "a factual support for the claim" could have been discovered. 28 U.S.C.

§2244(d)(1)(D). Treating factual support as a factual predicate confuses "knowledge of the factual predicate of [the] claim with the time permitted for gathering evidence in support of that claim." *Flanagan*, 154 F.3d at 199. For example, "the principal *fact*" for a claim that counsel ineffectively argued a coercion defense is the fact that "trial counsel attempted to present a coercion defense." *Owens*, 235 F.3d at 359. And that fact is "known at trial." *Id.* Adding new evidence to an already-available claim does not make the claim newly available.

Even if new evidence could restart the clock, expert reports generally are not new evidence. They offer "a *conclusion* based on facts that were known … or discoverable by [the petitioner] or his counsel at the time of trial." *Rivas*, 687 F.3d at 536. When an expert reviews a case file or evidence and testimony from trial, their opinions are not previously undiscoverable. Indeed, the basis for Ayers's ineffective-assistance claim is that counsel failed to consult someone like Lentini, whose input at trial "could have resulted in Ayers's acquittal." App.7. That claim, if true, would only prove that an opinion like Lentini's was available before trial because any expert could have analyzed the same evidence and offered an opinion supporting Ayers.

Finally, the Sixth's Circuit's approach when applied to future cases may effectively erase the deadline for many prisoners. The Sixth Circuit assumed that Ayers on her own could *never* discover the factual predicate because she was an indigent prisoner. App.9–10. But so are many prisoners. If being indigent means that there is a freeze on the discoverability of support for habeas claims—and if that support qualifies as a new factual predicate—then late-breaking postconviction counsel essentially

controls the deadline. Whenever they discover the new support, no matter how long after the direct appeal, *that* will be the day that the new support was discoverable with due diligence. AEDPA does not allow that. And clarifying that new support is not a new factual predicate will close this loophole.

III. The equities favor a stay.

Because the Sixth Circuit remanded for the District Court to resume consideration of Ayers's habeas petition, denying a stay of the mandate meant ordering parallel litigation in this Court and the District Court. As this Court considers whether to grant certiorari and review this case, the District Court is also tasked with resuming work on Ayers's potentially time-barred case. Parallel litigation like this wastes judicial resources.

And in this case, that waste of resources has virtually no countervailing benefit. Ayers is not in prison anymore, so a short delay to allow for a petition for certiorari imposes meager burdens on her, even assuming that she would ultimately prevail below. And the delay for certiorari will likely be either a short delay before this Court denies certiorari or else a longer but well-justified delay if this Court grants and reviews the case.

A stay would also aid this Court's jurisdiction. Because this appeal raises issues of timeliness only, it is the perfect vehicle for this Court to review questions about when to start the one-year clock. But since the District Court is bound by the Sixth Circuit's ruling, moving forward with the case below can add nothing helpful to this Court's consideration. At best, it would not impact this appeal at all, and at worst, it

would inject distracting arguments about mootness. A stay staves off any potential problems by halting parallel-track litigation until this Court completes its review.

CONCLUSION

The Court should recall and stay the Sixth Circuit's mandate pending disposition of the Director's petition for a writ of certiorari.

Respectfully submitted,

DAVE YOST
Attorney General of Ohio

/s/ *T. Elliot Gaiser*
T. ELLIOT GAISER*
Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
JANA M. BOSCH
Deputy Solicitor General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614.466.8980
thomas.gaiser@OhioAGO.gov

Counsel for Applicant