No. 24A553

In the Supreme Court of the United States

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, DIRECTOR,

Applicant,

v.

KAYLA JEAN AYERS,

Respondent.

OPPOSITION TO 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

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One might reasonably wonder why the State is seeking the extraordinary relief from this Court that is a recall of the mandate and a stay pending review of the petition for certiorari.[1]

The State's application is unusual, given what little is at stake with the requested stay. In the decision below, the court of appeals reversed the district court's dismissal of Ms. Ayers's petition for habeas corpus as untimely. The court merely concluded that Ms. Ayers's habeas petition is not time barred—and thus proceedings may move forward. As the district court recently observed, the case is "fully briefed." Order, No. 5:20-cv-01654-SL (N.D. Ohio Oct. 23, 2024). The district court referred the matter to a magistrate judge, who will decide the pending issues on the timeframe the magistrate deems appropriate. *Id*. There is no urgency here warranting the State's requested relief: There is no impending trial and, because Ms. Ayers has already completed her sentence, there is no forthcoming release of an otherwise-incarcerated individual. The *sole* basis the State offers for a recall of the mandate and a stay is the potential of "parallel litigation."

If these circumstances were sufficiently exceptional to warrant recall of the mandate and a stay, then virtually *every* case that comes before this Court involving a remand to a district court would qualify. Stating the conclusion refutes the premise. Nothing here remotely rises to the gravity warranting the exercise of extraordinary equitable relief, as the State requests.

The State's application is further surprising, given the State's own conduct.

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[1] The State filed a similar application less than two months ago, which the Court promptly denied. *Davis* v. *Smith*, No. 24A419 (application denied on Nov. 22, 2024). The Court should do the same here.

The court of appeals issued its decision on August 26, 2024. The State filed—and the court of appeals granted—a motion to extend the deadline for a petition for rehearing until September 23, 2024. But the State never filed a rehearing petition. Instead, on September 26, 2024—after the time for rehearing expired, and a full month after the decision issued—the State asked the court to stay its mandate, a request the court swiftly and unanimously rejected on October 8, 2024. The mandate thus issued on October 16, 2024. (It was shortly thereafter, on October 23, 2024, that the district court referred outstanding issues to the magistrate judge.) Rather than spring to action after its October 8 loss below, the State waited nearly two months more before filing the present application on December 2, 2024. The State's lackadaisical behavior to date belies its claim that extraordinary relief is warranted.

And the State's application is downright bizarre given the facial implausibility of the petition for certiorari itself. Nowhere does the petition identify any *legal standard* that is allegedly in conflict. Nor could it. In issuing its decision below, the court of appeals explicitly adopted the very same legal test that governs in the circuits that the State claims are in conflict. There is thus no dispute about the governing legal rule. Rather, the divergent results that the State presents stem entirely from different facts. The State has no colorable contention that other courts of appeals, addressing these facts, would reach a different result.

The Court should swiftly deny the State's rather peculiar application.

STATEMENT

A. Legal background

A federal habeas petition challenging a state-court judgment must be filed within one year of the latest of several possible dates including, as relevant here, "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Courts assessing the timeliness of a habeas petition under this provision thus must ascertain the factual predicate of the claim, determine when a person acting with due diligence would have discovered it, and then determine if the petition was filed within one-year of that date (subject to any tolling provisions).

The statute does not define the term "factual predicate," but courts—including the Sixth Circuit—have uniformly defined the term to mean the "'vital facts' underlying the claim." *Rivas* v. *Fischer*, 687 F.3d 514, 535 (2d Cir. 2012) (quoting *McAleese* v. *Brennan*, 483 F.3d 206, 214 (3d Cir. 2007)); see also App.7. In other words, the facts "without which the claim would necessarily be dismissed." *Rivas*, 687 F.3d at 535. To assess if a person has acted with due diligence, courts must determine when a "duly diligent person in petitioner's circumstances would have discovered" the information (*Wims* v. *United States*, 225 F.3d 186, 190 (2d Cir. 2000)), mindful that the standard is not "maximum feasible diligence, only 'due,' or reasonable, diligence" (*id.* at 190 n.4). The timeliness inquiry under Section 2244(d)(1)(D) is thus highly "fact-specific" and therefore reviewable for clear error. *Rivas*, 687 F.3d at 534.

B. Factual background

Ms. Ayers was convicted of aggravated arson and child endangerment in 2012, after a mattress in the basement of her home caught fire. App.2-3. According to Ms. Ayers, the fire may have been caused by her son playing with a lighter or because she fell asleep while smoking. App.3. The State, however, succeeded in prosecuting her for intentionally starting the fire. App.4. Critical to Ms. Ayers's conviction was the testimony of Reginald Winters, the fire inspector. App.4. Winters prepared an expert report in support of the prosecution, relying on a fire-inspection manual called NFPA 921. App.4. Winters opined that the fire was caused by "some sort of open flame" and speculated with a level of "'scientific certainty' that a 'deliberate act of a person' caused the fire." App.4. The report also concluded that the fire had two distinct ignition points, a finding the prosecution emphasized to undercut Ms. Ayers's explanation that the cause of the fire was accidental. App.4. Ms. Ayers's criminal trial counsel did not consult an arson expert or independent fire inspector, nor did they challenge the admissibility of Winters's report or his qualifications as an expert. App.4-5.

Ms. Ayers endeavored for years to obtain counsel, all the while maintaining her innocence. App.5. In 2019, prospective counsel consulted with an expert, John Lentini, who is one of the principal authors of the NFPA 921. App.5. Lentini prepared an expert report evaluating the evidence of Ms. Ayers's case, as well as Winters's expert report. App.5. Winters's expert testimony was, as it turns out, completely unreliable.

Fundamental defects in Winters's testimony were unknowable by a layperson like Ms. Ayers. Specifically, Lentini determined that "there was no evidence that two fires were simultaneously burning' and that 'the damage was indistinguishable from damage caused by normal fire spread from a single point of origin.'" App.5 (alterations incorporated and quotation marks omitted). Lentini also questioned Winters's qualifications to testify as an expert because Winters's "methods were 'unreliable, unscientific, and at odds with generally accepted fire investigation methodology.'" App.5. Ms. Ayers received Lentini's report on July 29, 2019, and she filed postconviction motions in state court approximately eight months later, on April 13, 2020. App.5.

C. Proceedings below

It is undisputed that Ms. Ayers filed a habeas petition in the United States District Court for the Northern District of Ohio within one year of Lentini producing his report, in addition to initiating state postconviction proceedings months before that. App.5; App.12. In the petition, Ms. Ayers asserted, among other things, a claim of ineffective assistance of counsel based on her trial counsel's failure to meaningfully rebut Winters's testimony. App.5. The district court dismissed the petition as untimely, concluding that Ms. Ayers could have discovered the deficiencies in Winters's expert report sooner with due diligence. App.5-6.

The Sixth Circuit reversed. It held that Lentini's expert report was the factual predicate of Ms. Ayers's ineffective assistance of counsel claim because "it provides facts supporting the claim's merits such that a court would not dismiss it sua sponte."

App.8. The court also concluded that Ms. Ayers exercised reasonable due diligence in obtaining the report when she did, particularly because she was a layperson who could not have understood the scientific defects in Winters's report on her own and because she was indigent and incarcerated. App.9-12. In other words, the report disclosed facts previously unknown to Ms. Ayers, and undiscoverable by her, that provided the basis for a previously unavailable ineffective assistance of counsel claim. Finally, the court concluded that Ms. Ayers had filed her petition within one year of obtaining the Lentini report. Pet. App.12.

After the Sixth Circuit entered its judgment on August 26, the State moved for an extension of time to petition for rehearing. C.A. Dkt. No. 22. But the State never sought rehearing. Instead, three days after its extended time expired, the State moved to stay the mandate. C.A. Dkt. No. 24. The court of appeals promptly denied that motion on October 8 (C.A. Dkt. No. 25), and the mandate issued on October 16 (Dkt. No. 26).

91 days after the court of appeals' judgment, the State filed a petition for certiorari. No. 24-584 (U.S.). Another week later—nearly two months after the court of appeals denied its motion to stay the mandate—the State filed this application seeking to recall and stay the mandate.

STANDARD OF REVIEW

"Denial of * * * in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009)

(Ginsburg, J., in chambers). "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." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). Each such showing is a "heavy burden." *Williams* v. *Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers) (quoting *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers)).

REASONS FOR DENYING THE APPLICATION

The application fails to satisfy any of the stay criteria. *First*, a grant of certiorari is not likely in this case. The State's supposed circuit split is illusory—in fact, the Sixth Circuit's approach in this case and others is entirely consistent with every sister circuit in the alleged split. And the decision below—which was primarily about the due diligence inquiry—is a poor vehicle to resolve the question presented, which concerns the factual-predicate inquiry, not the diligence inquiry. *Second*, the court applied the correct test and reached the correct result. Thus, the State has not shown a fair chance of this Court reversing the decision below. And *third*, the State's only asserted harm—which they delayed raising to this Court for nearly two months after the mandate issued—is the burden of litigation, but precedent establishes beyond cavil that such a "harm" does not warrant extraordinary equitable relief.

I. THE COURT IS UNLIKELY TO GRANT CERTIORARI OR OVERTURN THE JUDGMENT BELOW.

The State fails to carry the heavy burden of establishing a reasonable probability that the Court will grant the underlying petition for certiorari. The petition presents none of the factors that would warrant this Court's intervention—the Sixth Circuit's approach is synchronous with that of its sister circuits, and this case is a poor vehicle to resolve the question presented in any event.

A. The circuits are not divided.

The State's assertion of a circuit conflict is mistaken on several scores.

At the outset, it is difficult to understand what *legal question* the State believes is the subject of disagreement among the circuits. Petitioner frames the question presented as: "When a prisoner obtains new support for a previously-available claim, does that mean she has a new 'factual predicate' that restarts her clock?" Pet. i. The answer to that question is obviously "no"—a point of uniformity among the circuits. The problem for the State is that the Sixth Circuit never held to the contrary. Rather, it rested on the separate finding that the claim here was *not* "previously available" to Ms. Ayers. Once the holding below is understood, the claim to a conflict dissipates entirely. That is, there is no divergent *legal standard* at issue. The State observes that cases reach different results—but those results are driven by different facts, not different legal standards.

1. It is apparent that the standard applied below is the very same that governs in every other circuit. Canvassing—and resting—on the law of six circuits (all of

whom the State positions on the opposite side of a conflict), the court of appeals described the settled standard to determine what qualifies as a "factual predicate" for purposes of Section 2244(d)(1)(D). The Sixth Circuit *agreed* with all these courts that "a factual predicate consists only of the 'vital facts' underlying the claim." App. 7 (quoting *Rivas*, 687 F.3d at 535). It further explained that "a fact is 'vital' if it is required for the habeas petition to overcome *sua sponte* dismissal"—that is, a fact that enables a petitioner to state a facially viable, previously unavailable, claim for relief. App.7 (citing *Rivas*, 687 F.3d at 535).

The State thus baldly misrepresents the decision below in claiming that it establishes some novel rule that "a factual predicate includes factual support for a previously available claim." Pet. 6. Quite to the contrary, the court concluded that Ms. Ayers "could not have known that the substance of Winters's testimony was unreliable and unscientific unless a qualified expert revealed it to her" and thus "Ayers 'was aware of the vital facts for h[er] claim' no earlier than that date." App.12.

In more detail, the court of appeals concluded that the Lentini report provided the factual predicate for Ms. Ayers's claims because it provided her a basis to assert both prongs of the *Strickland* ineffective assistance of counsel inquiry. App.7-8 (citing *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984)). The report provided—for the first time—Ms. Ayers a factual basis to claim that she had been prejudiced by her counsel's deficient performance because "[t]he State relied heavily on Winters's testimony [discredited by Lentini], so without it, there is a reasonable probability Ayers

would have been acquitted." App.8. Lentini's expert report thus enabled Ms. Ayers to state an ineffective assistance of counsel claim that could not have been sua sponte dismissed. App.8. The court further held that, on the unique facts of this case, "Lentini's report was not readily available, and Ms. Ayers could not have gleaned his opinions from another source." App.9. Thus, the Lentini report was not merely additional evidentiary support for a previously available claim, but provided the factual predicate for an ineffective assistance of counsel claim that was *not available* until she could have obtained the Lentini Report using reasonable diligence.

Finally—again drawing upon the guidance of its sister circuits—the court assessed "'when a duly diligent person in [Ms. Ayers's] circumstances would have discovered' the factual predicate for her ineffective-assistance claim." App.9 (quoting *DiCenzi* v. *Rose*, 452 F.3d 465, 470 (6th Cir. 2006) (quoting in turn *Wims*, 225 F.3d 190)). It concluded that "[u]ncovering the factual predicate of her claim before she had representation was infeasible" (App.10), and "courts must account for the 'reality of the prison system' when deciding whether due diligence would have unveiled the factual predicate of a habeas petition." App.9-10 (quoting *Easterwood* v. *Champion*, 213 F.3d 1321, 1323 (10th Cir. 2000)). Thus, Ms. Ayers had exercised due diligence, and the petition was timely filed because it was filed within a year of receiving the Lentini report.

In sum, to determine if Ms. Ayers's habeas claim was timely, the court engaged in a highly fact-specific inquiry to identify the factual predicate of the claim and

evaluate whether a reasonably diligent person in her position would have discovered that predicate earlier. Along the way, it expressly sourced the legal standards it applied from its sister circuits, favorably citing cases from nearly every circuit that the State claims applies a different test. Ultimately, that analysis led the court to conclude that the Lentini report provided Ms. Ayers a factual basis to state a previously *unavailable* ineffective assistance of counsel claim.

2. Especially given the great lengths the court below took to harmonize its approach with those of the other courts of appeals, the State's assertion of a circuit split is meritless. The petition argues (at 7) that the "[m]ost relevant" example of the purported split is the Second Circuit's decision in *Rivas,* 687 F.3d 514, which, ironically, is the primary out-of-circuit case the court below relied upon to describe the proper legal standard. See App.7. Just as in the decision below—and as the petition endorses (see Pet. 8)—the *Rivas* court defined a claim's factual predicate as only the "'vital facts' underlying the claim," as judged by whether a district court could sua sponte dismiss a habeas petition that lacked those facts. *Rivas*, 687 F.3d at 535 (quoting *McAleese*, 483 F.3d at 214). The court also stressed that "[t]he determination of the date on which the factual predicate for a habeas claim is first discoverable is a 'fact-specific' inquiry.'" *Id.* at 534; see also *Wims*, 225 F.3d at 190.

To be sure, undertaking such a fact-intensive inquiry, the *Rivas* court concluded that the newly-produced expert report at issue in *that* case was not the factual predicate of the petitioner's claim under *Napue* v. *Illinois*, 360 U.S. 264 (1959) that

the state's medical examiner falsely testified at trial about the victim's time of death. *Rivas*, 687 F.3d at 535-536. But in *Rivas*, all the information contained in the new report was known to petitioner or "discoverable with due diligence" well before the cut-off date for the petition to be timely. *Id.* at 536. Indeed, the record specifically accounted for the petitioner's knowledge of all the key information disclosed in the report at earlier dates. *Ibid*. Thus, the expert report did not reveal any new facts that served as the basis for a previously unavailable claim premised on the state's introduction of false testimony.

The facts here—as well as the nature of the legal claim—differ. Here, the Lentini report disclosed a new fact that the court below determined was *not* known or discoverable by Ms. Ayers any earlier: Winters's expert testimony was so substantively wrong that it was disqualifying. App.8 ("[T]he State does not explain how Ayers could have discovered Lentini's expert opinions without him providing them in the report."). Importantly, that fact provided the basis for a previously unavailable ineffective assistance of counsel claim because it showed that Ms. Ayers had been prejudiced by her *counsel's* deficient performance. App.7-8 (explaining why the Lentini report provided Ayers a factual basis for her *Strickland* claim).

The court thus did not depart from the legal reasoning in *Rivas*—indeed, it embraced the factual predicate standard described in *Rivas*. App.6. In fact, the panel analyzed and distinguished another Sixth Circuit case that had reached the same result as *Rivas* on the same ground that the new expert opinion in that case involved

previously known facts and thus did not disclose new facts that provided the basis for a new claim. App.8-9 (analyzing *Stokes* v. *Leonard*, 36 F. App'x 801, 803-805 (6th Cir. 2002)). The court of appeals below did not disagree with that line of reasoning; it simply found the facts of this case to compel a different result. In this case, unlike *Rivas* and *Stokes*, "Ms. Ayers could not have gleaned [the expert's] opinions from another source." App.9.

Thus, far from disagreeing with the Second Circuit's decision in *Rivas*, here the Sixth Circuit largely *modeled* its legal analysis on *Rivas* and concluded that the different facts lead to a different outcome. That is not the makings of a circuit split. The State simply disagrees with the Sixth Circuit's fact-bound conclusion.

The State finds no more support in *Martin* v. *Fayram*, 849 F.3d 691, 696 (8th Cir. 2017). See Application 6-7. In *Martin*, the court applied the same "vital facts" standard embraced in the decision below. See 849 F.3d at 696. It then concluded that the factual predicate of the *Martin* petitioner's ineffective assistance of counsel claim was his trial counsel's "failure to object to certain aspects of the prosecution's closing argument" and his appellate counsel's "failure to raise his trial counsel's alleged ineffective assistance" on appeal. *Id.* at 697. These facts, the court explained, were immediately known to the petitioner, even if their "legal significance" may have only dawned on him later. *Ibid.*

In the decision below, by contrast, the Sixth Circuit reasoned that Ms. Ayers, "a layperson, could not have known that [the expert's] analysis was not scientifically

sound simply by hearing his testimony." App.10. Thus, unlike the petitioner in *Martin*, who was immediately aware of his counsel's failure to object and only potentially ignorant of the *legal* implications of that failure, Ms. Ayers simply had no reason to suspect, until receiving the Lentini report, that, as a matter of *fact*, "the *substance* of [the expert's] testimony was 'complete bunk.'" App.10 n.2 (quoting *Ege* v. *Yukins*, 485 F.3d 364, 373 (6th Cir. 2007)). In other words, the factual predicate of Ms. Ayers's claims is not (as it was in *Martin*) the "flawed" "manner" of the expert's trial testimony, such as its internal inconsistency. App.10 n.2. Just as with the petitioner in *Martin*, Ms. Ayers could have observed those facts as the trial unfolded, and, indeed, her counsel did object during the trial on that basis. App. 10 n.2. But Ms. Ayers could not have known that, based on the scientific deficiencies of his testimony, the expert was not qualified until she "consulted an expert of her own." App. 10 n.2. As a result, it was not until Ms. Ayers received the expert report that *she* could state a claim alleging that her counsel rendered prejudicial ineffective-assistance by not having consulted an expert previously.

In short, the decision below is completely consistent with *Martin*. As with *Rivas*, the legal analysis the Sixth Circuit employed was no different than that used by the Eighth Circuit. The facts simply differed, and thus the courts reached different outcomes.

3. The rest of the cases cited in the petition—several of which the Sixth Circuit also cited approvingly to articulate the proper legal standard—all follow the same

pattern. Each applies the same legal standards the Sixth Circuit applied. The courts reached different outcomes from the decision below because, on the facts of each case, the factual predicate *had* been known or knowable to the petitioner more than a year before the habeas petition was filed:

- **First Circuit**: In *Holmes* v. *Spencer*, 685 F.3d 51, 58-59 (1st Cir. 2012), the habeas petitioner claimed that his counsel had provided ineffective assistance by negotiating a plea deal that promised the petitioner legally unenforceable benefits in exchange for pleading guilty. *Id*. at 59. The factual predicate for that claim was the sequence of events leading the petitioner to plead guilty, all of which were known to the petitioner as soon as they occurred. *Ibid.* The court rejected the petitioner's claim that the factual predicate was instead his later realization that the plea deal was unenforceable, as this realization did not pertain to "a factual matter but rather a matter of law * * * beyond the scope of § 2244(d)(1)(D)." *Ibid*. (quoting *Murphy* v. *Strack*, 9 F. App'x 71, 73 (2d Cir. 2001)).
- **Third Circuit**: In *McAleese*, 483 F.3d at 208-209, the factual predicate for the habeas petitioner's claim that the government wrongfully denied his parole application to coerce his cooperation in another case was the government's denial of his parole application, rather than the content of a later-discovered letter from the government to the parole board related to that denial. The discovery of that letter thus did not reset the

limitations period, and the petitioner obviously knew of the parole denial (i.e. the factual predicate) as soon as it occurred. See also App.7 (Sixth Circuit citing *McAleese* approvingly for its legal standard)

- **Fifth Circuit**: In *Flanagan* v. *Johnson*, 154 F.3d 196, 198-199 (5th Cir. 1998), the habeas petitioner claimed that he was unaware that he had a right to refuse to testify at his trial. The court held that "the factual predicate of [his] claim[] [was] the fact that he was called to testify and did not know he had the right to refuse," not an affidavit supplied by his trial counsel years later attesting that counsel could not recall if he had advised the habeas petitioner of this right. *Id.* at 199. That affidavit, which did not "change[] the character of [the petitioner's] pleaded due process claim nor provide[] any new ground for Flanagan's federal habeas petition," was simply an additional piece of supporting evidence for a habeas claim that he had all the necessary knowledge to file years earlier. *Ibid.* See also App.7 (Sixth Circuit citing *Flanagan* approvingly for its legal standard).
- **Seventh Circuit**: In *Johnson* v. *McBride*, 381 F.3d 587, 588-589 (7th Cir. 2004), the court rejected a habeas petitioner's argument that the factual predicate for his claim that the state withheld evidence that another person also participated in the crime of conviction (thus decreasing the petitioner's own culpability in that crime) was not yet discoverable

because the state had not turned over evidence that the petitioner speculated might disclose that the state viewed the other person as a suspect. The court explained that this speculation that there might be evidence to support his theory was not sufficient to reset the statute of limitations for his claim, as "[a] desire to see more information in the hope that something will turn up differs from 'the factual predicate of [a] claim or claims' for purposes of § 2244(d)(1)(D)." *Id.* at 589. After all, because there was no dispute that the petitioner *had* participated in the crime, he already knew, as a matter of fact, whether or not the other individual had also participated. *Ibid.*

- **Tenth Circuit**: In *Taylor* v. *Martin*, 757 F.3d 1122, 1122-1124 (10th Cir. 2014), the factual predicate of the habeas petitioner's claim that a witness had perjured himself was that witness's testimony. As the court explained, the habeas petitioner had personal knowledge of the subject of the testimony and was thus in a position to know, at that time of the testimony, whether or not the witness was lying. *Id*. at 1123-1124. Accordingly, the court rejected the habeas petitioner's argument that the witness's later recanting of the testimony was the claim's factual predicate.
- **Eleventh Circuit**: In *Cole* v. *Warden, Georgia State Prison*, 768 F.3d 1150, 1156-1157 (11th Cir. 2014), the habeas petitioner claimed that he

> did not understand his trial rights under *Boykin* v. *Alabama*, 395 U.S. 238 (1969), before pleading guilty. Though petitioner claimed that he did not understand those rights until many years later after being informed of them by a prison librarian, the court rejected that belated understanding as the factual predicate for his habeas claim because the petitioner had signed a plea form apprising him of his *Boykin* rights when he pleaded guilty, and thus knew or should have known about his rights at that time. *Cole*, 768 F.3d at 1156-1157. See also App.7 (Sixth Circuit citing *Cole* approvingly for its legal standard).

These cases are all wholly compatible with the analysis below. In each case, the habeas petitioner knew or should have known about the factual predicate of his or her claim well before the newly discovered evidence at issue. And the later-discovered information in each case was simply evidentiary support for those claims, if even that. Here, the Sixth Circuit did not opine, as the State asserts, that later-discovered evidence that merely supports an existing factual basis resets the limitations period. Rather, the court concluded that the expert report was *not* mere evidentiary support for a preexisting claim but provided the vital factual basis for an ineffective assistance of counsel claim in its own right. After all, the report disclosed to Ms. Ayers that Winters had given false testimony and was unqualified to testify, a fact she was in no position to discover on her own as an indigent, incarcerated layperson faced with testimony of an ostensible expert in fire reconstruction.

There is thus no legal difference between the decision below and the cases the State cites. It is purely a distinction in facts that drives different outcomes. That is, there is no reason to conclude that any other circuit, evaluating the fact pattern presented here, would come to a different result. The courts all apply the same standard.

4. This is not mere conjecture—the proof is in the precedent. Several of the circuits that the State claims are at odds with the Sixth Circuit's approach have reached similar results to the decision below when considering analogous facts.

The Fifth Circuit, for instance, has approved of a newly produced affidavit and expert report as the factual predicates for several claims in a second and successive petition (which is subject to a comparable factual predicate and due diligence standard under 28 U.S.C. § 2244(b)(2)(B)(ii)). See *In re Swearingen*, 556 F.3d 344, 348-349 (5th Cir. 2009). As here, in *Swearingen*, the habeas petitioner brought an ineffective-assistance claim based on his counsel's failure to adequately develop forensic evidence favorable to him. *Id.* at 349. "Because Swearingen's expert * * * was unable to analyze this evidence [earlier], the factual predicate for this claim could not have been previously discovered with the exercise of due diligence." *Ibid.*

Additional examples abound in which the courts of appeals have ably distinguished later-discovered *facts* from later-discovered evidence supporting facts a petitioner knew or should have known. See, *e.g.*, *Fielder* v. *Varner*, 379 F.3d 113, 115 (3d Cir. 2004) (Alito, J.) (finding the factual predicate to be the new "discovery of an alleged eyewitness to the shooting" who accused a different person of committing the

crime); *Quezada* v. *Smith*, 624 F.3d 514, 520 (2d Cir. 2010) (finding Section 2244(b)(2)(B)(i)'s factual predicate requirement timely satisfied where a witness recanted his testimony because he was coerced to testify, information the petitioner "could not have * * * discovered through the exercise of due diligence"); *Slutzker* v. *Johnson*, 393 F.3d 373, 378, 381-382 & n. 8 (3d Cir. 2004) (factual predicate of habeas petitioner's *Brady* claim was the discovery of police reports in which witness admitted an alternative suspicious person had not been the petitioner); *Wilson* v. *Beard*, 426 F.3d 653, 656 (3d Cir. 2005) (habeas petitioner's discovery of video tape in which prosecutor admitted to intentionally weeding out Black jurors was the factual predicate for *Batson* claim); *Jimerson* v. *Payne*, 957 F.3d 916, 924 (8th Cir. 2020) (new affidavit of another individual confessing to crime was the factual predicate of actual innocence claim); *Mathena* v. *United States*, 577 F.3d 943, 946 (8th Cir. 2009) (belated receipt of federal detainer was factual predicate for claim that petitioner's state and federal sentences improperly ran consecutively rather than concurrently).

On the other side of the coin, several cases from the court below hold that additional evidentiary support for existing claims (rather than, like here, new facts providing the basis for a new claim) will not restart the statutory deadline, because all the vital information was known or knowable to the habeas petitioner well before. Indeed, it is binding authority in the Sixth Circuit that "new information discovered '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 under § 2244(d)(1)(D).'" *Jefferson* v. *United States*, 730 F.3d 537, 547 (6th Cir. 2013) (quoting *Rivas*, 687 F.3d at 535)).

Thus, in *Stokes* v. *Leonard*, the court held that a new expert affidavit was *not* the factual predicate for a habeas petitioner's ineffective assistance of counsel claim because all the information discussed in that affidavit concerned a "readily available" "body of evidence" that had been "disseminated to the public through the media in a number of ways." 36 F. App'x at 805. Indeed, the panel below cited and agreed with the rationale of *Stokes*, merely finding the facts distinguishable. App.8-9. Likewise, in *Souter* v. *Jones* (another case cited in the decision below (see App.8)), the court determined that a new affidavit by a police laboratory technician who had testified at the petitioner's trial, raising some doubts about the evidence presented at the time, was not a factual predicate timely raised in the belated petition, as those same doubts had already surfaced at the trial and were thus already known to the petitioner. 395 F.3d 577, 587 (6th Cir. 2005). See also*, e.g.*, *Alexander* v. *Birkett*, 228 F. App'x 534, 536 (6th Cir. 2007) (statement by judge at hearing was not the factual predicate for petitioner's claims, where that statement related to information the petitioner knew, and had already invoked in support of his claims).

* * *

In all, the State cannot show any likelihood of a grant of certiorari given the marked uniformity among the circuits on the governing legal standard and the

consistency in outcomes across the courts of appeals under that settled legal standard. See S. Ct. R. 10(a).

B. Beyond the lack of a circuit conflict, the Court is unlikely to grant review.

The illusory circuit conflict is just one of several problems the petition faces. This is a poor vehicle to address the question presented; while the State asks the Court to address what qualifies as the "factual predicate" of a habeas claim as that term is used in Section 2244(d)(1)(D), it appears that the State substantially quarrels with the lower court's separate "due diligence" analysis—but that latter issue is not the question the petition presents. Second, there is a significant question concerning this Court's jurisdiction. Third, the State's claim that the opinion below raises significant problems in need of correction is incorrect.

1. The petition presents a single question: the meaning of "factual predicate" as used in Section 2244(d)(1)(D). Pet. i. The State frames the question presented as whether "new support for a previously-available claim" is a "new 'factual predicate.'" Pet. i. As we said earlier, even as framed, there are very substantial problems with this question. To start, no one disagrees with the answer—the circuits are all uniform. Nothing in the opinion below, nor elsewhere in Sixth Circuit precedent, suggests that the Sixth Circuit believes that new evidentiary support for previously available claims amounts to a new factual predicate. See *Jefferson*, 730 F.3d at 547 (rejecting that contention). Rather, the State quarrels with how that rule applies here, but that is a naked request for error correction, without any error in sight. The

second problem is that the State gets the premise badly wrong. It repeatedly characterizes Ms. Ayers's ineffective-assistance claim as having been "previously available" (see Pet. 1, 5, 6, 12). But the court of appeals below *rejected*—as a factual matter—the premise that Ms. Ayers's claim was "previously available."

In truth, the State's disagreement with the decision below is not about the factual predicate of Ms. Ayers's claim at all but *when* the underlying facts were known or knowable by Ms. Ayers with due diligence. Thus, notwithstanding the question the State chose to frame, much of the petition actually challenges the lower court's holding on this *separate* aspect of Section 2244(d)(1)(D)—the requirement that Ms. Ayers exercise "due diligence." For instance, the petition complains that the Sixth Circuit "compounded" its purported errors by holding that Ms. Ayers "could never discover the factual predicate because she was an indigent prisoner." Pet. 15 (citing Pet. App. 12a). But this is *not* the "factual predicate" question the petition presents. Rather, it is an issue quite apart from what the State asks the Court to address. That is, it pertains to the separate issue of when a diligent person in Ms. Ayers's circumstances could have discovered Lentini's expert opinion (or a comparable expert analysis).

Indeed, in trying to frame a conflict among the circuits, the State frequently intermixes holdings that principally focus on the "due diligence" element of Section 2244(d)(1)(D). See, *e.g.*, Pet. 17 (citing *Jordan* v. *Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1359 (11th Cir. 2007) ("What matters under § 2244(b)(2)(B)(i) is whether Jordan, with the exercise of due diligence, could have discovered those facts at the time he filed his

first federal habeas petition."); *In re Davila*, 888 F.3d 179, 186 (5th Cir. 2018) ("Davila fails to make a prima facie showing that the factual predicate for his new habeas claim could not have been discovered through the exercise of due diligence and thus could not have been included in his first federal petition.").

In total, many of the differences in outcome in the cases of other circuits come down not to the "factual predicate" question, but rather the distinct "due diligence" analysis. Indeed, that seems to be the State's true claim of error. Yet the petition does not ask the Court to resolve any question relating to this separate issue.

2. There is yet another flaw to the petition—whether this Court even possesses jurisdiction (or, relatedly, if the State violated a claims processing rule).

The court of appeals entered its judgment on August 26. The State did not file its petition until 91 days later—on Monday, November 25. The State's late filing arguably deprives the court of jurisdiction.

28 U.S.C. § 2101(c) provides that a cert petition must be filed "within ninety days after the entry of * * * judgment," and speaks of no exception absent a motion for an extension. To be sure, the Court long ago held that "the considerations of liberality and leniency which find expression in" Federal Rule of Civil Procedure 6(a) spill over into Section 2101(c); the Court thus allowed an automatic extension of the filing deadline until Monday when the ninetieth day falls on a weekend. *Union Nat'l Bank of Wichita, Kan.* v. *Lamb*, 337 U.S. 38, 41 (1949). More recently, however, the Court has clarified that the "90-day limit is mandatory and jurisdictional" and thus

the Court has "no authority to extend the period for filing except as Congress permits." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). Thus, "[u]nless the State's petition was filed within 90 days of the entry of the Court of Appeals' judgment, [the Court] must dismiss the petition." *Ibid*.

As Justice Thomas has recognized, this question—whether a petition for certiorari due over the weekend extends automatically to the next business day—raises "threshold questions about the timeliness of the petition for certiorari that might preclude us from reaching" the merits of a case. See *California Bldg. Indus. Ass'n* v. *City of San Jose*, 136 S. Ct. 928, 929 (2016) (Thomas, J.). To even reach the question supposedly presented, the Court would need to resolve this jurisdictional issue first.

3. The State's parade of horribles—that there are "federalism questions" (App. 9) and other lurking monsters—warrant no weight because there is no divergence in legal standard. See pages 8-22, *supra*. As we explained, all circuits apply the same test, including the court below. Different facts predictably drive different results. There is no question of systemic concern that plausibly warrants review.

C. The decision below is correct.

Separately, there is no basis to conclude there is a "fair prospect" that the Court will reverse the decision below. As we have shown, the decision below reflects a mainstream, run-of-the-mill analysis of the factual predicate of Ms. Ayers's habeas claim, properly applying the prevailing "vital facts" standard before moving on to a fact-intensive due diligence analysis. There is no broad legal question for the Court to

review. And, while error correction is apparently what the State is after, there is no error to be found, either.

That much is apparent on the face of the decision. Here, the Lentini report disclosed previously unknown facts that created the basis for a previously unavailable ineffective assistance of counsel claim. And, as the Sixth Circuit concluded, she could not reasonably have obtained Lentini's expert opinion (or another opinion like it) any sooner than she did. Under the approach that prevails across the circuits, the report was an appropriate and diligently discovered "factual predicate" within the meaning of Section 2244(d)(1)(D). That is all the Sixth Circuit, in its highly fact-specific inquiry, determined here.

In short, the court below applied to right test and arrived at the right conclusion. This Court would thus not be likely to reverse the decision below.

II. THE EQUITIES CANNOT JUSTIFY A RECALL AND STAY.

The stay application should also be denied for the independent reason that the State cannot show that any of the equities favor a stay.

As a threshold matter, "Justices have * * * weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Whalen*, 423 U.S. at 1317 (Marshall, J., in chambers). In that tradition, the Sixth Circuit's unanimous rejection of the State's request to recall and stay mandate (see App.14) deserves considerable weight.

In an effort to overcome that overriding presumption, the State raises only one equitable argument in favor of a stay: the lack of a stay creates the possibility of "parallel litigation," which, in the State's view, risks becoming a "waste of resources." Application 12. That insubstantial argument—which would apply in *every* case involving a remand—fails several times over.

The *sole* issue the state wishes to avoid here is proceeding with garden-variety litigation in the district court, with final judgment far off in the future. To be clear, Ms. Ayers has been released from incarceration because she *completed her sentence*. This habeas proceeding is no doubt substantial—it will determine whether Ms. Ayers continues to have collateral consequences that stem from a felony conviction (such as restrictions on gun possession and registration requirements)—but this is not a situation where the requested stay has any bearing on whether an individual remains incarcerated. This is thus not remotely the sort of circumstances that warrants the Court's exercise of extraordinary authority to issue a recall and stay where the court of appeals already denied such relief.

First, it is black letter law that litigation burdens alone do not constitute irreparable harm in the context of requests for extraordinary equitable relief. See, *e.g.*, *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 746 (2023) ("[L]itigation burdens alone do not constitute irreparable harm."); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost,

does not constitute irreparable injury."); *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974) (similar).

Second, while the State attempts to evade the problem by casting its arguments as a concern for judicial resources, that argument is fatally flawed as well. By framing it as a concern for *judicial* resources, the State has literally made *no* argument about how it will, itself, suffer irreparable harm. And, regardless, the public burden of litigating is not an adequate harm to grant the extraordinary relief of a stay either, particularly where a court has already made a judgment, as the Sixth Circuit did here, that the proper course is for the case to proceed. See *Whalen*, 423 U.S. at 1317 (Marshall, J., in chambers). Additionally, the State's concerns about the burdens of parallel litigation lack foundation. The district court has already indicated on remand that it considers the "matter [of Ayers's petition] fully briefed," meaning any burdens of additional litigation on the parties or the judiciary is *negligible*. Order, No. 5:20-cv-01654-SL (N.D. Ohio Oct. 23, 2024). The State presents no reason why this Court should overrule the lower courts' judgment of the burdens.

Third, any argument for irreparable harm is undermined by the State's conduct in this appeal. The State has taken a rather nonchalant approach here. The State sought an extension to seek rehearing in the Sixth Circuit (C.A. Dkt. No. 22)—but then never filed any such petition. Instead, it moved to stay the mandate *after* the extended rehearing time expired, more than a month after the court of appeals entered its August 26 judgment (C.A. Dkt. No. 24 (motion to stay the mandate)). The

Sixth Circuit promptly denied the motion to stay the mandate on October 8 (C.A. Dkt. No. 25), and the mandate issued on October 16 (C.A. Dkt. No. 26). Two *more* months elapsed before the State filed this application seeking to recall and stay the Sixth Circuit's mandate. These actions belie the State's claim that an urgent and extraordinary stay of a mandate is necessary. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.* 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers) ("[T]he Administrator's failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay."); *Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm").

Finally, the State is wrong to assert that a stay would not inflict harm on Ms. Ayers. She has a clear interest in timely resolution of her—highly meritorious—habeas action. As this court has recognized, "[t]hose few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Brecht* v. *Abrahamson*, 507 U.S. 619, 634 (1993). While Ms. Ayers may no longer be incarcerated, she suffers harm every day she remains wrongfully convicted, in the form of collateral consequences that linger from conviction—including an ongoing obligation to register with the State (see, *e.g.*, Ohio Rev. Code Ann. § 2909.15(D)(2)) and a restriction on possessing firearms (18 U.S.C. § 922(g)(1)). The State, by contrast, has no need for a stay of mandate—it does not identify a single irreparable harm it would face were the

district court to continue evaluating Ms. Ayers's habeas petition, during this Court's consideration of the petition for certiorari. In the unlikely event that this Court were to grant certiorari and to reverse the judgment below, the lower courts could readily implement that judgment with no harm done to the State. Ms. Ayers has every need to clear her name; that process should proceed and not be delayed by the State's belated request for extraordinary relief.

CONCLUSION

The Court should deny the application.

Respectfully submitted.

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