No. 24A553

In the Supreme Court of the United States

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, DIRECTOR,

Applicant,

v.

KAYLA JEAN AYERS,

Respondent.

REPLY IN SUPPORT OF 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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REPLY

Ayers's response confuses matters through shifting definitions—just like those circuits on the wrong side of the split. A "factual predicate" becomes a "vital fact," a term interpreted narrowly by the majority of circuits but permissively by the minority. A "previously-available claim" becomes a "previously-available conclusion," which is *not* a reason to restart the clock in eight circuits—but *is* in two. Cutting the equivocations reveals the split.

Recall that Lentini's expert opinion was based on the trial record. He opined based on the same "[fire-inspection] manual that [the State's trial expert] relied on," the same "evidence that [two fires] were simultaneously burning," and the same "damage" to the mattress. App.5 (quotation omitted). He also "questioned [the trial expert's] qualifications," using the trial record and the same fire-inspection manual. *Id.* The Sixth Circuit called that a new "vital" fact. App.12 (quotation omitted).

But other circuits do not interpret "factual predicate" to include new opinions or realizations based on facts available at trial. Most relevant, the Second Circuit holds that expert reports based on facts known or discoverable at trial are merely "[c]onclusions drawn from preexisting facts," meaning they "are not factual predicates." *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012). Other circuits apply the same reasoning to cases about new evidence or legal understanding. Stay App'n.7–11.

The Sixth Circuit broke with its sister courts by treating a new opinion like a new fact despite parroting other circuits' language. If it had followed the majority rule, it would have recognized that anyone could have raised the exact critiques that Lentini

did at any time, including at trial. In fact, the idea that Ayers could have a claim for ineffective assistance of counsel *assumes* that counsel could have known the things that Lentini later wrote. In other words, just like in *Rivas*, "all the information contained in the new report was known to petitioner or discoverable with due diligence" before the deadline. Resp.12 (quotation omitted). Accordingly, the Second Circuit would have rejected Ayers's arguments that the Sixth accepted.

This all explains why Ayers cannot erase the circuit split by gesturing at uniform language, Resp.8–11, or by painting Lentini's conclusions as new "facts," Resp.8, 12. It also explains why this petition is not asking the Court to delve into a fact dispute or a due-diligence analysis. Resp.22–24. No one disputes that Lentini's report rehashes the trial record and offers a new opinion; the question is whether that opinion qualifies as a "factual predicate." And whether the Sixth Circuit's due-diligence analysis is correct depends on whether the factual predicate was counsel's performance (which Ayers observed at trial), the general critiques of Winters (which were discoverable at trial and by Ayers's new counsel on appeal), or Lentini's report. The Sixth Circuit says it is Lentini's report, and eight other circuits would disagree.

As for Ayers's claims of ignorance, she faces a dilemma. If she claims that her *scientific* ignorance excuses her untimeliness, she defeats her own claim. After all, counsel was also a scientific layman, so if no layman could have known of the need for an expert, then counsel was not negligent. But if she claims that *legal* ignorance excuses her untimeliness, she admits a yawning circuit split. Stay App'n.6–8.

Lastly, four quick points require rebuttal. *First*, Ayers represents a Fifth Circuit case as aligning with the Sixth Circuit, but it does not. The Fifth Circuit noted that the new claim did not rest "on the correctness of [the trial expert's] testimony." *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009). If it had, the court would *not* have permitted it because that "could have been disputed at any time." *Id.*

Second, the Sixth Circuit's other cases do not sew up its split. *Jefferson v. United States* makes the statement Ayers quotes, not about a new opinion based on old facts, but a previously unknowable *Brady* violation. 730 F.3d 537, 547 (6th Cir. 2013). Likewise, *Souter v. Jones* is uninstructive; it merely observed that evidence is not new when it is "cumulative to the evidence already presented by the defense at trial." 395 F.3d 577, 587 (6th Cir. 2005). Neither of these holdings is relevant to the split that *Ayers* widened. The third case, *Stokes v. Leonard*, was correct on this exact point of law, but it is unpublished and now stands effectively overruled by *Ayers*, notwithstanding any lip service *Ayers* pays it. 36 F. App'x 801, 805 (6th Cir. 2002).

Third, Ayers argues incorrectly that the petition was untimely. Resp.24–25. It was timely: because the statute does not specify a different computation method, deadlines falling on a weekend or legal holiday roll to the next workday. S. Ct. Rule 30.1; *see also* Fed. R. App. P. 26(a). Ayer's contrary suggestion notwithstanding, the Court's rule is consistent with the statute's 90-day language, especially in light of the fact that the congressionally approved Federal Rules of Appellate Procedure adopt the pervasive norm that courts do not accept filings on weekends or holidays and thus roll the deadline to the next workday. *Union Nat. Bank of Wichita, Kan. v. Lamb*,

337 U.S. 38, 41 (1949); *Caspari v. Bohlen*, 510 U.S. 383, 390–91 (1994). If *Lamb* does not answer the question, this Court still has statutory discretion to add days for "good cause." 28 U.S.C. §2101(c). The fact that the Court is closed on those days, making filing impossible, could be understood as de facto "good cause." Should all else fail, this Court should take one of two paths: formally grant the necessary extension now for the "good cause" that the Director followed this Court's rules, or take up the timeliness of the petition alongside the merits. After all, no one would purposely file on the 91st day to tee up this issue, so it will never arise in a better vehicle.

Fourth, a stay furthers this Court's jurisdiction. This case presents no emergency; it presents a disorderly process of parallel litigation, which has no obvious solution besides a stay. It is not clear whether a grant of certiorari stays the lower court's proceedings. *Compare, e.g.*, *McCurry v. Allen*, 688 F.2d 581, 586 (8th Cir. 1982); *with, e.g., Waskey v. Hammer*, 179 F. 273, 274 (9th Cir. 1910). So requesting a stay serves to respect this Court jurisdiction in cases with ongoing remands that might interfere with this Court's work. Moreover, a stay is particularly harmless here, since Ayers is not incarcerated and will continue under many of the collateral consequences regardless because of her other felony convictions. *E.g. State v. Ayers*, No. 2023CR0511 (Stark Cnty. Ct. C.P.) (felony identity fraud).

AEDPA's limits are supposed to protect State's criminal trials from becoming a "tryout on the road to federal habeas relief." *Shinn v. Ramirez*, 596 U.S. 366, 377, (2022) (quotation omitted). Opening the door to new expert opinions stretches a

mousehole exception into a cavernous loophole with no closing date. Only one other circuit has ever allowed that move, and this Court should shut it down.

CONCLUSION

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

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