No. 18-6450

In the Supreme Court of the United States

JUSTEN RUSSELL,

Petitioner,

v.

LASHANN EPPINGER, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly deny Justen Russell's request for a certificate of appealability on his 28 U.S.C. § 2244(d)(1)(B) state-created impediment argument?

2. Did the Sixth Circuit correctly determine that Russell had failed to introduce any evidence that he had acted diligently to discover any state appellate rights that he might have had?

3. Did the Sixth Circuit correctly deny Russell's request for a certificate of appealability on his equitable-tolling argument?

LIST OF PARTIES

The Petitioner is Justen Russell, an inmate at the Grafton Correctional Institution.

The Respondent is LaShann Eppinger, the Warden of the Grafton Correctional Institution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

Other Authorities

INTRODUCTION

Justen Russell is in prison because he smoked marijuana, drove the wrong way on Interstate 76, and killed another driver. The government charged Russell with murder and a host of other crimes. But it dismissed the murder charge in exchange for Russell's agreement to plead guilty to one count of aggravated vehicular homicide and four counts of felonious assault. Exhibits, Doc. 8-1, PageID# 78–80. Instead of facing fifteen years to life, Russell received a jointly recommended, determinate sentence of fifteen years. *Id.* He did not appeal.

Three years after sentencing—well past the time to appeal—Russell moved for leave to file a delayed appeal in state court. Motion, Doc. 8-1, PageID# 91–97. When the state courts denied his request, he sought federal habeas relief, "arguing that he was denied due process, equal protection, and the effective assistance of counsel when the trial court and his counsel failed to notify him of his right to appeal and ensure that a timely appeal was filed." *See Russell v. Bradshaw*, No. 17-3959, 2018 U.S. App LEXIS 18416, *2–3 (6th Cir. July 5, 2018).

The petition was untimely. Federal habeas petitioners are subject to a one-year limitations period that runs from the latest of four enumerated events. Relevant here, 28 U.S.C. § 2244(d)(1)(A) gave Russell one year to seek federal relief following "the expiration of the time for seeking" direct review of his conviction in state court, and he did not file within that period. But Russell argued that his petition was nonetheless timely under § 2244(d)(1)(B) and (D). The first of these subsections says that the limitations period begins to run against a petitioner facing a state-created impediment to filing only once that impediment is removed.

§ 2244(d)(1)(B). Under the second, the limitations period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." § 2244(d)(1)(D).

The District Court rejected Russell's arguments. So did the Sixth Circuit. That court denied a certificate of appealability as to the § 2244(d)(1)(B) argument, and rejected the § 2244(d)(1)(D) argument after concluding that Russell could have discovered the basis for his claim more than a year before filing had he exercised due diligence. *See Russell*, 2018 U.S. App LEXIS 18416 at *3–4.

Russell now seeks review of three issues, all of which rest on procedurally flawed or factbound arguments that implicate neither circuit splits nor issues of great importance and that fail on the merits. *First*, he asks this Court to decide whether his habeas petition is timely under § 2244(d)(1)(B). But that issue is not before the Court: the Sixth Circuit denied a certificate of appealability as to that issue, *see* Order, Doc. 9-2, and Russell has not challenged its denial, *see Miller-El v. Cockrell*, 537 U.S. 322, 331 (2003) ("A COA ruling is not the occasion for a ruling on the merit[s] of petitioner's claim[s].").

Second, Russell argues that he *did* exhibit due diligence in discovering the basis for his claim, and that his delay is attributable to a severe mental illness that led to his being confined to a segregated Residential Treatment Unit while in prison. *See* Pet. 7. Russell has never provided evidence in support of this argument, which is anyway too factbound to justify review. *Cf. Lawrence v. Florida*, 549 U.S. 327, 337 (2007) (declining to consider equitable tolling argument where

habeas petitioner "made no factual showing of mental incapacity"). And regardless, the Sixth Circuit properly refused to consider it since Russell raised the argument for the first time on appeal. *See* Apt. Br., Doc. 11, PageID# 11–12.

Finally, Russell argues that he is entitled to equitable tolling. As is true of his second argument, this one is too factbound to justify review. And as is true of his first argument, this one is not before the Court because Russell has not challenged the Sixth Circuit's denial of a certificate of appealability. *See Russell*, 2018 U.S. App LEXIS 18416 at *3–4.

The Court should deny Russell's petition for certiorari.

STATEMENT

1. Justen Russell smoked marijuana and drove the wrong way down Interstate 76. Brief, Doc. 8-1, PageID# 98. He crashed into another vehicle, killing one person. Indictment, Doc. 8-1, PageID# 44. The State indicted him on one count of murder, two counts of aggravated vehicular homicide, and four counts of felonious assault. Indictment, R. 8-1, PageID# 44, 47–49.

Russell entered a plea deal instead of going to trial. Under the terms of that deal, the State dismissed the murder charge in exchange for Russell's pleading guilty to one count of aggravated vehicular homicide and four counts of felonious assault. Russell and the State agreed that Russell should receive a sentence of fifteen years. The trial court imposed that sentence on September 20, 2012. Doc. 8-1, PageID# 79.

2. On March 25, 2015—about two-and-a half years later, long after his right to appeal had expired—Russell sought leave to file a delayed appeal in state court.

Motion, Doc. 8-1, PageID# 91–97. Russell tried to justify his untimeliness by asserting that he had never been informed of his limited appeal rights under Ohio Rev. Code § 2953.08(D)(1), which generally prohibits appeals of jointly recommended sentences. *Id.* at PageID# 94. The state appellate court denied Russell's request, noting that Russell had not produced a transcript of his trial-court proceedings, and thus failed to demonstrate that he had not been advised of his appeal rights. Order, Doc. 8-1, PageID# 105–06.

Russell appealed the denial of his request for a delayed appeal to the Ohio Supreme Court, *see* Brief, Doc. 8-1, PageID# 110–17, but that court declined to accept jurisdiction over his appeal on August 26, 2015, *State v. Russell*, 36 N.E.3d 189 (Ohio 2015).

3. Almost a year later, on August 18, 2016, Russell filed a petition for a writ of habeas corpus in federal court. *See* Petition, Doc. 1. Russell presented a single ground for relief in his petition: he alleged that the trial court and his own attorneys violated his Sixth and Fourteenth Amendments rights by failing to advise him of his right to appeal. Petition, Doc. 1, PageID# 5.

To obtain any relief, however, Russell had to overcome the one-year limitations period applicable to habeas petitions. 28 U.S.C. § 2244(d)(1). He conceded that he filed his petition far more than a year after "the expiration of the time for seeking" direct review. § 2244(d)(1)(A). Russell offered only one justification for the late filing. Citing § 2244(d)(1)(D), he contended that neither the trial court nor his trial counsel had informed him of his appeal rights. Petition, Doc. 1, PageID# 9–10.

The Warden moved to dismiss Russell's petition, arguing that there was no basis under § 2244(d) to justify or excuse Russell's untimeliness. Motion to Dismiss, Doc. 8. Russell responded by pointing to *two* alternative limitations period. He continued to rely on § 2244(d)(1)(D), under which the limitations period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Russell argued that because no one ever advised him of his appeal rights, the one-year limitations period began to run only once he discovered those rights on his own. Memorandum Contra, Doc. 9, PageID# 172. But he also argued that he timely filed under § 2244(d)(1)(B), which provides that the limitations period runs from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." He said the trial court and his attorney impeded him from timely filing by failing to tell him about his right to appeal. *See id.* In the alternative, Russell asked the Court to allow him to file an otherwise-untimely petition under the equitable-tolling doctrine. *Id.*

The District Court disagreed with Russell and granted the Warden's motion. Entry, Doc. 14. It first rejected Russell's (d)(1)(B) argument, reasoning that "the trial court's failure to inform [Russell] of his appellate rights did not constitute a state-created impediment." Opinion and Order, Doc.13, PageID# 201 (citing *Miller v. Carson*, 49 F. App'x 495 (6th Cir. 2002)). With respect to his (d)(1)(D) argument, it held that Russell had not diligently pursued his rights, and that he knew of the

factual predicate underlying his claims no later than March 26, 2015—well over a year before he filed his habeas petition on August 26, 2015—when he moved in state court for the right to file a delayed appeal. *Id.* at PageID# 201–02. The District Court further rejected Russell's request for equitable tolling: that relief requires proof of diligence too, and so Russell's lack of diligence defeated his request. The District Court denied a certificate of appealability on all counts, certifying that an appeal could not be taken in good faith. *Id.* at PageID# 202.

4. Russell applied to the Sixth Circuit for a certificate of appealability and the court granted his request in part. Order, Doc. 9-2. It denied his certificate of appealability as to his equitable-tolling and § 2244(d)(1)(B) arguments. *Id.* at PageID# 2. But it granted the certificate as to the question of whether Russell's habeas petition was timely under 28 U.S.C. § 2244(d)(1)(D) and (d)(2), the latter of which tolls the limitations period for the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending in state court." *Id.* Russell pointed out that his state-court proceedings were pending from March 25 to August 28, 2015. Brief, Doc. 11, PageID# 12. Thus, he argued that the limitations period was tolled during that time, that the limitations period began to run only on August 28, 2015, and that he timely filed on August 18, 2016. *Id.*

The Sixth Circuit agreed with Russell that the District Court should not have counted the period between March 25 and August 28, 2015, toward his limitations period. *Russell*, 2018 U.S. App Lexis 18416 at *3. But it affirmed on other grounds.

It held that Russell had not "met his burden of showing that he exercised due diligence during the 29-month period between his sentencing in September 2012 and March 2015," when he finally tried to pursue an appeal in state court. *Id*. Specifically, he failed to identify anything he did after sentencing to inquire about his potential appellate rights, and had "otherwise provided no adequate explanation for the long delay." *Id*. at *3. Thus, because §2244(d)(1)(D) tolls the limitations period only until "the factual predicate of the claim or claims presented could have been discovered *through the exercise of due diligence*," Russell's limitation period began running well before March 2015, and expired well before August 2016, when he finally petitioned for federal habeas relief.

Russell argued in the alternative that he was entitled to equitable tolling. But the court recognized that this argument was "beyond the scope of his certificate of appealability," and thus refused to consider it. *Id.* at *3–4.

REASONS FOR DENYING THE WRIT

I. Russell's first question presented involves an issue on which the Sixth Circuit denied a certificate of appealability, and that is not properly before this Court.

Russell's first question presented asks this Court to decide whether he timely filed his federal habeas petition under § 2244(d)(1)(B). Once again, that section permits the limitations period to run from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." According to Russell, the trial court and his own attorneys imposed a

"state-created impediment" to timely filing when they failed to advise him of his rights to appeal under *state* law.

Russel has identified no circuit disagreement over whether the facts in this case permit finding a state-created impediment. Nor has he argued that this Court's intervention is required to resolve an unsettled question about the meaning of § 2244(d)(1)(B). Indeed, his petition for a writ of certiorari is lacking any legal analysis of that statute whatsoever; none of the cases that Russell cites in support of his first question presented interpret or apply § 2244(d)(1)(B)'s state-created impediment language. See Pet. 2–6. So what he seeks is factbound error correction. While such requests rarely justify granting certiorari, Russell's request is especially weak for three reasons: Russell's § 2244(d)(1)(B) argument is not properly before the Court, it fails on the merits, and Russell could not obtain meaningful relief even if he succeeded in this Court.

A. Russell notes that the Sixth Circuit "did not address" whether a state-created impediment prevented him from filing a timely habeas petition, *see* Pet. 4, but he declines to mention the reason it did not address that question. The appellate court did not do so because the question was never properly before it. Neither the District Court nor the Sixth Circuit granted Russell a certificate of appealability on the question whether a state-created impediment prevented him from filing a timely petition for a writ of habeas corpus. See Judgment Entry, Doc. 14, PageID# 203; see also Order, Doc. 9-2. Perhaps for that reason, Russell never mentioned 28 U.S.C. § 2244(d)(1)(B) in his Sixth Circuit brief. See Brief, Doc. 11. It

is well-settled that "[a] COA ruling is not the occasion for a ruling on the merit[s] of petitioner's claim[s]." *Miller-El v. Cockrell*, 537 U.S. 322, 331 (2003). And this Court will not generally consider a claim that was neither raised in nor addressed by the court below. *See United States v. Jones*, 565 U.S. 400, 413 (2012) (argument considered forfeited when it was not raised below). Indeed, because the Sixth Circuit did not issue any opinions addressing Russell's § 2244(d)(1)(B) issue, he is really seeking review of the District Court's unpublished resolution of that argument.

Because the lower courts denied Russell a certificate of appealability as to his § 2244(d)(1)(B) argument, the maximum relief available to him would have been a reversal of that decision and a remand for consideration of the merits of his claims. *See Miller-El*, 537 U.S. at 337 (describing certificate of appealability inquiry as a threshold examination). But he did not seek that relief; his petition does not challenge the Sixth Circuit's reasons for granting only a limited certificate. Instead, he asks that this Court address the merits of a § 2244(d)(1)(B) argument that the Sixth Circuit never took up on the merits. It should decline to do so. *See Miller-El*, 537 U.S. at 336 (certificate of appealability inquiry "does not require full consideration of the factual or legal bases adduced in support of the claims).

B. Russell's argument also fails on the merits. Again, he contends that his counsel and the state trial court violated his rights by failing to inform him of his limited appeal rights under Ohio Rev. Code § 2953.08(D)(1). *See* Pet. 3. That failure, he suggests, should be considered a state-created impediment. *Id.* But even if Russell's allegations about these failings are correct, those failings do not qualify

as the relevant sort of "state-created impediment" for purposes of § 2244(d)(1)(B). That section refers to state-created impediments "to filing an application," which is naturally read as applying "only when the petitioner has been impeded from filing the *federal habeas petition*." Brian R. Means, *Federal Habeas Manual* § 9A:22 (2011) (emphasis added); *accord Shannon v. Newland*, 410 F.3d 1083, 1087–88 (9th Cir. 2005). Russell does not allege that the state somehow impeded his ability to timely file a federal habeas application when his state proceedings concluded—he says the state failed to provide him the information needed to file a *state* appeal. In other words, the impediment to which Russell points is the violation of his right to be informed of opportunities to appeal, *not* an impediment to timely challenging the violation of that right in habeas proceedings. Section 2244(d)(2)(B) is concerned only with the latter type of impediment.

Russell's argument is especially weak as it pertains to the failure of his lawyer, rather than the court. Attorneys, even state-appointed ones, are not state actors for purposes of this provision. *See Finch v. Miller*, 491 F.3d 424, 427 (8th Cir. 2007); *see also Polk County v. Dodson*, 454 U.S. 312, 324–25 (1981) ("a public defender does not act under color of state law when counsel to a defendant in a criminal proceeding").

C. Finally, Russell's argument would not afford him any meaningful relief *even if he prevailed* on the law. A defendant in Ohio who pleads guilty has only a limited ability to appeal when that defendant receives a sentence that is jointly recommended by the defense and the prosecution. Ohio Rev. Code § 2953.08(D)(1)

("A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."). Courts have held that, under such circumstances, there is no obligation to inform a defendant about any potential appeal rights. *See State v. Weir*, 2018-Ohio-2827 (Ohio App. 2018); *State v. Middleton*, 2005-Ohio-681, ¶ 25 n.1 (Ohio App. 2005); *see also Thompson v. Sheets*, No. 3:07-CV-2423, 2009 U.S. Dist. Lexis 62236, *5 (N.D. Ohio July 21, 2009). In this case, although he expresses a desire to appeal, Russell has not identified any argument under which he could obtain relief in light of Ohio Rev. Code § 2953.08(D)(1). So even if this Court were to grant review, reverse, and ensure Russell an opportunity to file a delayed appeal, he will get nothing out of it: the limitations imposed by § 2953.08(D)(1) would prevent him from prevailing on appeal. There is no reason to hear a case that will neither resolve important legal issues nor entitle the individual petitioner to meaningful relief.

II. Russell's second question presented is not worthy of Supreme Court review.

Although presented as a single question, Russell's second question presented actually involves two separate legal claims. *First*, it involves a claim that Russell's petition was timely under 28 U.S.C. § 2244(d)(1)(D). *Second*, it involves a claim that Russell is entitled to equitable tolling. Although they are separate claims, they suffer from a similar flaw: Russell failed to properly raise or preserve either argument, meaning that neither is suitable for this Court's review. In any event, his failure to exercise diligence in pursuing his rights dooms both claims

A. Russell failed to preserve his argument that mental illness and the conditions of his confinement prevented him from exercising due diligence.

Russell argued for the first time on appeal to the Sixth Circuit that he suffers from a mental illness, that he had been confined in a residential treatment unit within prison because of that illness, and that, as a result of both his illness and his confinement, he was prevented from discovering the legal or factual bases for his habeas claim. *See* Brief, Doc. 11 at PageID# 11–12. There are two problems with this argument: it is not preserved, and it fails on the merits.

1. Russell never made this argument in the District Court. At most, he noted that he believed that he suffered from a mental illness that somehow contributed to his decision to drive the wrong way down an interstate highway. *See* Memorandum Contra, Doc. 9, PageID# 175. But he made just one argument in opposition to the Warden's motion to dismiss his habeas petition as untimely: that neither the trial court nor his trial counsel informed him of the limited appeal rights that were available to him under Ohio Rev. Code § 2953.08(D)(1) (providing that a jointly recommended sentence cannot be appealed if it is authorized by law). *See id.* at PageID# 172–77.

The Sixth Circuit has been clear that it will not consider claims that are raised for the first time on appeal. *Perez v. Oakland County*, 466 F.3d 416, 429–30 (6th Cir. 2006). That is likely why its opinion did not consider this argument. Regardless of the reason, Russell's failure to raise this issue at the appropriate time means that it has not been preserved and cannot be considered now. This Court does not grant certiorari to resolve issues that no court below ever considered. *See*

Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

2. Russell's argument boils down to a plea for error correction. He identifies no circuit split or recurring legal issue, but insists that review is necessary because the Sixth Circuit erred in refusing to find that his alleged mental illness or conditions of confinement excused his failure to diligently pursue relief. There is, however, no evidence supporting Russell's arguments. Throughout these proceedings, Russell has provided nothing to support his claim that he suffers from a mental illness or unusually confining conditions—let alone any evidence that shows that his claimed illness or prison conditions prevented him from exercising due diligence and discovering the factual predicate of his claim. That is not enough to demonstrate Russell's due diligence. *Cf. Lawrence v. Florida*, 549 U.S. 327, 337 (2007) (declining to consider equitable tolling argument where habeas petitioner "made no factual showing of mental incapacity"). And it is certainly not enough to demonstrate the scope and severity of mental illness (or other impediment) that other courts have found necessary to excuse an untimely habeas petition. *Cf. United States v. Sosa*, 364 F.3d 507, 512–13 (4th Cir. 2004) (equitable tolling available "only in cases of profound mental incapacity").

Finally, and as already explained, Russell would not be entitled to any meaningful relief under Ohio law even if he prevailed in federal habeas proceedings. *See*

above 10–11. A request for error-correction is especially weak in a case where victory would not afford the petitioner meaningful relief.

B. The Court should not take up Russell's equitable-tolling argument, which the Sixth Circuit never considered.

Although Russell attempts to bundle an equitable tolling claim together with his §2244(d)(1)(D) due diligence claim, the two are factually and legally distinct. *See Holland v. Florida*, 560 U.S. 631, 647–48 (2010) (provisions of § 2244(d)(1) that trigger the running of the statute of limitations are not the same as equitable tolling provisions). More fundamentally, the Sixth Circuit granted Russell a certificate of appealability on his § 2244(d)(1)(D) argument, but declined to do the same for his equitable-tolling argument. Thus, the Sixth Circuit deemed that issue "beyond the scope of the certificate of appealability," and declined to consider it. *Russell*, 2018 U.S. App Lexis 18416 at * 3-4.

As with Russell's first question presented, Russell has not appealed the Sixth Circuit's decision denying a certificate of appealability on this issue. And, as with his §2244(d)(1)(D) argument, Russell's failure to prove that he diligently pursued relief dooms his equitable-tolling argument on the merits. *See Holland*, 560 U.S. at 649 ("[A] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.") (internal quotation marks omitted). Combine this with the fact that reversal would afford him no meaningful relief, *see above* 10–11, and this argument amounts to a request for review of a fact-

bound, splitless issue that the Sixth Circuit never discussed and that will have no real-world impact. There is no reason to hear an argument like that.

CONCLUSION

The Court should deny Russell's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Benjamin M. Flowers, counsel for Respondent, hereby declare that the Brief in Opposition was served on all parties required to be served, including Petitioner:

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The foregoing document was served on this 5th day of February 2019.

/s/ Benjamin M. Flowers
Benjamin M. Flowers