No. 18-7188

In the Supreme Court of the United States

IAN DAVIS,

Petitioner,

v.

DAVE MARQUIS, 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. Does a three-judge panel's decision to allow a second or successive habeas petition under 28 U.S.C. § 2244(b)(2)(B) automatically open the actual-innocence gateway to filing an untimely petition?

2. Did the District Court err when it denied Davis's untimely request for duplicative discovery?

LIST OF PARTIES

The Petitioner is Ian R. Davis, an inmate at the Richland Correctional Institution.

The Respondent is Dave Marquis, the Warden of the Richland Correctional Institution. Marquis is automatically substituted for the former Warden. *See* Fed. R. App. P. 43(C)(2); Sup. Ct. R. 35.3.

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INTRODUCTION

In 1991, authorities in Lorain, Ohio discovered the body of twenty-two year old Marsha Blakely discarded in an alley. The murderers beat her badly, slashed her throat, and broke her neck and several ribs when they ran her over with a car. Eventually, a man named William Avery, Jr. came forward and admitted to witnessing a group of men committing the crime. That group included petitioner Ian Davis. Based in part on this evidence, the police charged Davis (and the others) with Blakely's murder.

At Davis's trial, the jury heard testimony from Avery regarding what he saw the night of the murder. They also learned of reasons to doubt Avery's credibility: He came forward only after police offered a reward; he told the whole story only after a polygraph indicated he had not been "completely forthcoming" during his initial statement to police; he demanded additional payment for testifying at the trial for one of Davis's accomplices; and he recanted his story altogether before recanting his recantation. But the Ohio jury heard an explanation for Avery's recantation. Specifically, the accomplice against whom Avery was supposed to testify had threatened Avery while they were housed in the same jail. And the jury learned of physical evidence—evidence that Avery could not have known without witnessing the crime himself—that backed up Avery's story. Faced with Avery's testimony, the impeachment evidence against Avery, and the physical evidence supporting Avery's testimony, the Ohio jury convicted Davis.

Davis has been challenging his conviction ever since, protesting his innocence and arguing that Avery lied at trial. In addition to Davis's unsuccessful direct ap-

peal, he has filed six unsuccessful state post-conviction proceedings and two previous unsuccessful federal habeas proceedings. This case involves much of the same. Avery has again recanted his testimony, now claiming that prosecutors knew he was lying during Davis's trial. Based on this newest recantation, Davis filed this untimely, procedurally defaulted, and successive federal habeas petition, apparently (though it is unclear) arguing that Ohio violated *Napue v. Illinois*, 360 U.S. 264 (1959), and *Brady v. Maryland*, 373 U.S. 83 (1963), by knowingly presenting a lying witness at his trial. Davis concedes that his claim is untimely, but argues that his actual-innocence claim permits him to file late. The District Court rejected his argument and dismissed the petition. A unanimous Sixth Circuit affirmed.

Davis now seeks certiorari, and this Court should deny his request. He poses two questions. The first asks whether petitioners who gain approval to file a second or successive petition under 28 U.S.C. § 2244(b)(2)(B) automatically satisfy the actual-innocence exception to filing an untimely petition. The Court should not grant certiorari as to this question for a few reasons. First, it involves no split; every appellate court agrees that the standard for receiving permission to file a second or successive petition is far lower than the standard for establishing actual innocence in the timeliness context. Second, as this unanimity suggests, there is no legal basis for merging these standards. Indeed, it would make no sense in practical terms: merging the standards would either make it unduly difficult to file a second or successive petition, or unduly easy to satisfy the actual-innocence exception to untimeliness. Finally, this is a bad vehicle for considering the issue. Davis did not raise,

and the Sixth Circuit did not address, the issue below. Further, Davis would not be entitled to relief even if the Court adopted the rule he proposes.

Davis's second question presented asks about the amount of discovery to which petitioners are entitled after filing a second or successive petition. This question, like the first, implicates no circuit split. Neither is there any serious allegation that the District Court erred by denying Davis the "exceptionally broad," duplicative discovery that he untimely sought.

Because Davis has not presented a certworthy question, this Court should deny review.

STATEMENT

1. This case involves the murder of Marsha Blakely. Police found her brutalized body abandoned in an alley behind a shopping center. *See State v. Davis*, No. 94CA005989, 1996 Ohio App. LEXIS 1031, at *1 (Ohio Ct. App. 1996). After their investigation stalled, the police offered a reward for information about the murder. *Id.* at *2. An eyewitness, William Avery, Jr., then implicated Davis and three others in Blakely's death. *See id.* Based on Avery's coming forward, authorities charged Davis with aggravated murder and felonious assault.

Avery's testimony proved to be a focus of Davis's trial. *See* A-32; *see also* A-113. Avery testified that he knew Davis because he sold crack cocaine for Davis and his associates. A-15. When Avery fell behind on his payments to the tune of a few thousand dollars, he offered to even things out by "beat[ing] somebody up." A-15. The group accepted his offer. Avery, Davis, and four other men went into an apartment where Blakely was staying. A-15–16. (The person whose apartment it

was turned up murdered too, and police suspected a connection between his death and Blakely's. A-69.) Once inside, the group's leader told Avery to "beat Marsha [Blakely] up." A-16. Avery refused, because Blakely was a longtime friend of his. So Davis and the other men assaulted Blakely themselves, apparently hoping to extract information from her. Blakely, in self-defense, hit one of the men in the face. That man grabbed his bleeding nose and stepped away, but Davis and the others kept beating Blakely until she fell unconscious. Davis grabbed Blakely by the arm and dragged her, face down, across a grassy or leafy surface to a car in the parking lot. The group then drove in two cars—including one the group borrowed from one of the assailants' girlfriends—to an alley behind the shopping center. Another man awaited their arrival, and began swinging a shiny object at Blakely after others dragged her body from the car. "Fearing for his life, Avery ran away." A-16.

No one would describe Avery as the most credible witness, and the jury learned of his flaws. For one thing, Avery's testimony seemed to be motivated by money. He did not come forward until the police offered a $2,000 reward for information about Blakely's death. A-71. Later, during the trial of one of Davis's accomplices, Avery demanded $10,000 to testify, and then refused to testify when prosecutors refused to meet his ransom. A-75.

Another problem with Avery's testimony is that Avery either changed his story or recanted it at least twice before Davis's trial. Nine days after Avery first came forward to the police, the police required him to undergo a polygraph exam, "which indicated he had not been completely forthcoming" in his first statement to police.

A-73 n.12. He had initially claimed that he observed the assault in the apartment, but denied seeing what went on in the alley. Only after this polygraph did Avery admit to being present in the alley. A-73 n.12. Avery recanted his eyewitness testimony altogether when testifying against Davis's accomplice in the accomplice's first trial (which ended in a mistrial); Avery claimed that he agreed to be an eyewitness only because he wanted the reward money. A-77 & n.13.

But the jury also heard explanations for much of this. Avery admitted he did not initially tell the police the "'whole truth,'" but explained that he was scared about placing himself at the scene of the murder. A-75. He further claimed to have been scared by his father's instruction "'not to say nothing about being behind the plaza.'" A-75. Avery had an explanation for his recantation too. When he refused to testify in the accomplice's trial, the trial judge had him jailed for contempt. Authorities were holding Davis's accomplice—the man against whom Avery was supposed to testify—in the same jail. A-75–77. According to Avery, one of the correctional officers attempted to bribe him not to testify. When Avery refused, the officers "brought [the accomplice] down to [his] door." The accomplice "made a motion like he was slitting a throat," and pointed at Avery. A-75–76. Because Avery "'was scared for [his] family'" and himself, he recanted. A-77.

In addition, the jury learned of evidence that corroborated Avery's version of events. For example, Avery told police that Davis had dragged Blakely's unconscious body from the apartment to the car "over a grassy or leafy area." A-21. The pathologist report revealed that a "'grassy substance'" was found under Blakely's

"buttoned-up pants" and attached to her skin, consistent with her having been dragged through a grassy area. A-20–21. Some of the corroborating evidence included evidence that Avery "'couldn't possibly have gotten from either the street or any reports . . . in the papers.'" A-19. For example, during Avery's first interview with the police, he told them that Blakely had hit one of Davis's accomplices in the face during the initial assault in the apartment, causing a nosebleed. Police obtained that same accomplice's jacket, and it had blood on the chest area that was consistent with the accomplice's blood type. The angle at which the blood hit the jacket was also consistent with a nosebleed. The fact that the police recovered and tested a jacket had never been made public. A-19.

It is worth noting that more corroborating evidence emerged long after Davis's trial, in an evidentiary hearing in a federal habeas proceeding for one of Davis's accomplices. A-21–22. This included testimony that Blakely might have stolen some drugs from the group that included Davis. This suggested a motive for the brutal murder, A-21, and was consistent with Avery's testimony that one of the New York men repeatedly asked Blakely, "Where's my shit at?" A-16. The hearing also included testimony that the girlfriend of one of Davis's accomplices told police she had loaned her car to her boyfriend, which was consistent with Avery's testimony that they used her car. A-21–22. Investigators further testified that one of Avery's two girlfriends admitted that Avery told her, about four days after the murder, that he had been at the crime scene and saw somebody stab Blakely. A-22.

Returning to the trial, the jury heard from Davis himself when he took the stand in his own defense. A-17. The jury apparently credited Avery rather than Davis, because it convicted Davis. The court sentenced him to a term of 8 to 15 years' imprisonment for the felonious assault, to be served consecutive to a term of life in prison (with parole eligibility after 20 years) for the aggravated murder. A-32.

An Ohio court of appeals affirmed, rejecting Davis's claim that "Avery's testimony [was] unreliable." *Davis*, 1996 Ohio App. LEXIS 1031, at *2. After discussing the evidence in the case, the court concluded that "[a]lthough Avery did change his story several times, he offered a plausible explanation for his inconsistencies." *Id.* at *7. Further, "the prosecution presented additional testimony which tends to corroborate Avery's account of what happened the evening Blakely was murdered." *Id.* The Ohio Supreme Court declined Davis's further appeal, finding that it did not present a substantial constitutional question. *State v. Davis*, 667 N.E.2d 985 (Ohio 1996) (table).

2. In the years that followed, Davis peppered the state and federal courts with unsuccessful claims for post-conviction relief. The detailed procedural history fills approximately eleven pages of the magistrate judge's report and recommendation, *see* A-35–46, and Ohio will not fully reproduce it here. But two themes emerge.

First, Davis's theory that Avery lied during trial and that the prosecutors knew about Avery's lies is not new. As early as 1998, Davis attempted to argue to

the state courts that "Avery admitted he had lied about witnessing Blakely's assault in order to obtain the reward money and avoid serving time," and that the state prosecutors had acted unconstitutionally by not telling Davis about this allegation during the trial and by allowing Avery to testify. A-36–37. Davis also presented versions of this theory in later state post-conviction proceedings. *See* A-42–44. *Second*, Davis has consistently ignored state and federal procedural rules, including time limits. Davis untimely filed his first federal habeas petition. *See* A-35. He also untimely filed four of his six state post-conviction proceedings, either initially or at the appeal stage. *See* A-39–40; A-42; A-45.

Davis's sixth unsuccessful state post-conviction proceeding is worth discussing in more detail. In November 2011, one of Davis's accomplices gave him a 2006 affidavit in which Avery recanted his trial testimony. A-42–43. Seven months later, Davis filed a motion in the state trial court seeking leave to file a delayed motion for a new trial, claiming newly discovered evidence. A-42. The trial court summarily denied Davis's motion. A-43. In March 2013, an Ohio appellate court affirmed, holding that Davis had not satisfied Ohio Criminal Rule 33(b)'s requirement to show by clear and convincing evidence that he filed his motion within a reasonable time after obtaining newly discovered evidence. *State v. Davis*, No. 12CA10256, 2013 Ohio App. LEXIS 747, at *8 (Ohio Ct. App. Mar. 11, 2013). That court also held that a hearing on the motion was not warranted. *Id.*

3. In August 2013, Davis sought authorization from the Sixth Circuit to file a successive habeas petition. R12-3, PageID#1324–27 (record citations are from No.

1:14CV2854 (N.D. Ohio)). In May 2014, a three-judge panel granted that authorization in part, limited to claims "stemming from Avery's alleged perjury." *In re Davis*, No. 13-3981, 2014 U.S. App. LEXIS 25125 (6th Cir. May 5, 2014).

Davis filed his successive habeas petition about six months later, in November. R1, PageID#1. Between that time and the day he filed his reply brief, Davis never asked for discovery or an evidentiary hearing. R29, PageID#3119. But in March 2016, "nearly eighteen [] months" after filing his petition, and after the District Court had "already expended significant time reviewing" the pleadings and the state court record "in order to resolve the pending motions," Davis filed a motion to conduct "exceptionally broad" discovery. R29, PageID#3119, 3120, 3123. The District Court denied the motion for four reasons. First it was untimely. Second, some of the discovery Davis sought was related to claims not clearly within the scope of the Sixth Circuit's authorization. Third, Davis had not demonstrated good cause to conduct such broad discovery. And finally, the court and Davis already had an "extensive evidentiary record" from a previous evidentiary hearing relating to Avery's credibility. R29, PageID#3119–24. Despite denying the request, the District Court promised to "revisit the issue" if it found additional discovery necessary. R29, PageID#3124.

The District Court ultimately denied Davis's second successive habeas petition, on three independently sufficient grounds. *First*, it found that several of Davis's claims had not been authorized by the Sixth Circuit and were not otherwise cognizable, and that his *Brady* and *Napue* claims did not in fact meet

§ 2244(b)(2)(B)'s requirements for successive habeas petitions. A-54–92. *Second*, it found that Davis's *Brady* and *Napue* claims were untimely under § 2244(d), and that Davis did not qualify for statutory or equitable tolling and had not successfully made an actual-innocence showing to warrant an exception from the statutory time limit. A-92–102. *Third*, and alternatively, it found that Davis's *Brady* and *Napue* claims were procedurally defaulted, and that Davis had not successfully made an actual-innocence showing to overcome the procedural default. A-102–110. The District Court granted a certificate of appealability on the *Napue* claim alone. A-117, A-139.

4. Davis appealed to the Sixth Circuit, which expanded the appeal to include the denial of his discovery motion. A-9. But the Sixth Circuit went on to unanimously affirm the District Court. It agreed with that court's first alternative holding that "Davis's petition was untimely and . . . he cannot show a credible claim of actual innocence to overcome the statute of limitations." A-2.

In reaching this conclusion, the Sixth Circuit recognized that the actual-innocence exception to untimely filings applies "'only when a petition presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" A-14 (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013)). Davis's petition presented no such evidence. To the contrary, the available evidence corroborated Avery's testimony: The leaf fragments on Blakely's body were consistent with Avery's story about her being dragged across a grassy area, A-16–17,

20–21; Avery told the police about an injury to a codefendant that was consistent with not-yet-public information, A-16–17, 19; the police gave Avery a polygraph after his first interview which detected dishonesty only with respect to Avery's initial denial that he witnessed the murder, A-22; in a later proceeding related to one of Davis's accomplices, testimony established that Avery told one of his girlfriends about the murder around the time that it occurred, A-18; a detective testified in those later proceedings that he learned of the girlfriend's testimony at the time, and believed it corroborated Avery's story, A-22; and, in the same later proceedings, Davis himself admitted to "his drug-dealing relationship" with the accomplice and to "his involvement in selling and transporting drugs to the Lorain area," and another witness testified that Blakely may have stolen money from the group, creating a motive for murder, A-18, 21.

In sum, Avery's "allegedly fabricated story has more corroboration than his recantation—by physical evidence, a polygraph, and his girlfriend's statement that he admitted to her that he witnessed Blakely's murder." A-23. As a result, the Sixth Circuit concluded that he had not met his high burden of establishing the actual-innocence exception to timeliness. It thus declined to reach his appeal of the District Court's ruling on his motion for discovery. A-25–26 n.13.

Davis timely filed this certiorari petition.

REASONS FOR DENYING THE WRIT

I. The Court should deny certiorari as to Davis's first question presented because the issue is splitless and this would be a bad vehicle in any event.

Davis's first question presented asks this Court to elaborate upon the relationship between § 2244(b)(2)(B)(ii) and the actual-innocence standard in *Schlup v. Delo*, 513 U.S. 298 (1995) and *McQuiggin v. Perkins*, 569 U.S. 383 (2013). More specifically, in the context of a motion to file a successive petition, is the standard needed to make a *prima facie* showing under § 2244(b)(2)(B)(ii), the same as the actual-innocence standard for excusing untimeliness?

The Court recently denied a petition presenting the same question. *See Richardson v. United States*, No. 18-738 (U.S.), *cert. denied* — S. Ct. — (Jan. 14, 2019); *see also Cooper v. Wong*, No. 09-363 (U.S.), *cert. denied sub nom. Cooper v. Ayers*, 558 U.S. 1049 (2009). It should do so again. There is no circuit split. Davis is wrong on the merits. Further, this is a bad vehicle for reviewing the question presented because Davis did not raise, and the Sixth Circuit did not pass on, the issue below, and because Davis will not win relief even if the Court adopts his rule.

This question involves the interaction between two complicated bodies of law: the law concerning successive habeas petitions and the actual-innocence exception to untimeliness. This section begins with background about the standards governing each context, before addressing the reasons to deny Davis's petition.

A. Successive petitions and actual innocence.

Federal habeas review of state convictions "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority," "frustrat[ing] both

the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citations omitted); *see Calderon v. Thompson*, 523 U.S. 538, 554–56 (1998). This is why the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") tightly circumscribes the availability of federal habeas relief to state prisoners. *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Relevant here, it permits a state prisoner to present such a claim *only once*, almost always in a single habeas petition. *See* § 2244(b)(1)–(2).

The qualifier "almost" is needed because state prisoners may bring a new claim in a "second or successive" habeas petition if they can satisfy one of the two "gatekeeping provisions" of § 2244(b)(2). *Panetti v. Quarterman*, 551 U.S. 930, 942 (2007); *cf. Tyler v. Cain*, 533 U.S. 656, 661 (2001). First, they may file a second or successive petition if their "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2244(b)(2)(A). Second, and more relevant to this case, they may file a successive petition when "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(i)–(ii). Federal courts lack jurisdiction to adjudicate second or successive petitions filed by petitioners who can satisfy neither

gatekeeping provision. *See Panetti*, 551 U.S. at 942; *Case v. Hatch*, 731 F.3d 1015, 1027 (10th Cir. 2013).

The gatekeeping requirements impose substantive limitations on second or successive petitions. But there are procedural limitations too. Specifically, AEDPA prescribes a two-step process by which a state prisoner must prove that his successive habeas petition satisfies the gatekeeping requirements.

At the first step, a state prisoner must file a motion "in the appropriate court of appeals for an order authorizing the district court to consider" the successive petition. § 2244(b)(3)(A). A three-judge panel must then, within a tight 30-day timeframe, decide whether to grant or deny permission to file the successive petition. *See* § 2244(b)(3)(B), (D). In deciding this, the three-judge panel may authorize a successive petition only if it determines that the state prisoner made "a *prima facie* showing that the application satisfies the requirements of this *subsection*." § 2244(b)(3)(C) (emphasis added). The "subsection's" requirements include only the gatekeeping requirements discussed above; they do not include other requirements imposed by other subsections of § 2244, such as § 2244(d)'s one-year limitation period. *In re McDonald*, 514 F.3d 539, 543 (6th Cir. 2008); *see* A-12.

Because the three-judge panel must decide whether those gatekeeping provisions have been satisfied on a tight 30-day deadline, on a limited record, and "usually" without a response from the government, *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997), their decision is necessarily "preliminary," *Case*, 731 F.3d at 1029. In other words, the panel's decision permitting a successive petition under

§ 2244(b)(2)(B) does not dictate the result in the district court, which may ultimately conclude that § 2244(b)(2)(B) is not satisfied. *See Tyler*, 533 U.S. at 660 n.3; *see also, e.g.*, *Case*, 731 F.3d at 1029–30; *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164–65 (9th Cir. 2000). Neither does it dictate the outcome in a later appeal. *Case*, 731 F.3d at 1029; *Villa-Gonzalez*, 208 F.3d at 1165. Consistent with the non-dispositive nature of the permission-to-file decision, panels apply a somewhat lenient standard in deciding whether to permit a second or successive appeal: the *prima facie* standard applicable at the permission-to-file step "'simply requires that the applicant make a showing of possible merit sufficient to 'warrant a fuller exploration by the district court.'" *In re Patrick*, 833 F.3d 584, 585 (6th Cir. 2016) (quoting *In re Watkins*, 810 F.3d 375, 379 (6th Cir. 2015)).

The second step comes once a state prisoner receives permission to file and files. At that point, the state prisoner must make a full showing to the district court that each of his new claims in fact satisfies the requirements of § 2244. *See* § 2244(b)(4); *Tyler*, 533 U.S. at 660 n.3. The district court's review of the state prisoner's claims at this second gateway is more comprehensive than the three-judge panel's review in a few significant ways. Unlike at the authorization stage, there are no tight timeframes rushing this decision. *See Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358 (11th Cir. 2007). The district court has the record available and a response from the government. *Id.* In light of all this, the petitioner at this stage must prove that he satisfies § 2244(b)(2)(B)(ii)'s requirements by "clear and convincing evidence." *Magwood v. Patterson*, 561 U.S. 320, 336 (2010). Needless to

say, this is a much higher bar to clear than the *prima facie* standard that applies at the permission-to-file step.

The scope of the district court's inquiry is also broader at this step than was the panel's inquiry at the permission-to-file step. It "shall dismiss" any claim that does not satisfy the requirements of "this *section*"—all of § 2244, as opposed to only § 2244(b)(2). *See* § 2244(b)(4). This includes § 2244(d)'s one-year period of limitation. § 2244(d); *In re McDonald*, 514 F.3d at 543–44. If, during this second step, the district court determines that the state prisoner filed the successive habeas petition outside of § 2244(d)'s one-year period of limitation, AEDPA generally requires the district court to dismiss the petition. *See* § 2244(b)(4).

This Court has recognized two narrow exceptions into AEDPA's one-year limitations period. The first, equitable tolling, applies when a petitioner shows that he diligently pursued his rights but was prevented from timely filing by an extraordinary circumstance beyond his control. *Holland v. Florida*, 560 U.S. 631, 649 (2010). This exception is not relevant to Davis's petition. A-13 n.6. But the second exception—actual innocence—is. That exception allows a successive habeas petitioner to avoid AEDPA's one-year limit if he can make a "convincing" case for actual innocence. *See Perkins*, 569 U.S. at 386. This requires persuading the court that, "'in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Id.* (quoting *Schlup*, 513 U.S. at 329)). This high standard is significantly harder to satisfy than the *prima facie* standard that applies when circuit courts decide whether to permit a successive petition under

§ 2244(b)(2)(B). This gateway actual-innocence showing thus operates as a *third* gateway showing that a state prisoner filing an *untimely* successive habeas petition must make before the federal courts may reach the merits of his constitutional claim.

The actual-innocence exception is relevant in one more respect: those who satisfy it can litigate procedurally defaulted claims. A claim is "procedurally defaulted" if "a state court refused to hear" it "based on an adequate and independent state procedural ground." *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). In general, federal courts may not hear procedurally defaulted claims. *Id.* But there are exceptions, and actual innocence is one such exception: those who can make "a convincing showing of actual innocence" can litigate procedurally defaulted claims in federal court. *See Perkins*, 569 U.S. at 386

In sum then, those seeking to rely on actual innocence to file an otherwise untimely successive petition must do three things. *First*, they must obtain permission to file from the circuit court, which requires making a *prima facie* showing of entitlement to relief under § 2244(b). *Second*, they must prove to the district court that they are in fact entitled to relief under all of § 2244. *Finally*, they must show that their untimeliness may be excused under either the equitable-tolling or the actual-innocence doctrines.

B. This Court should deny certiorari as to Davis's first question presented.

1. Davis's first question presented does not implicate a circuit split.

Davis asks this Court to adopt a new categorical rule: every time a three-judge panel determines that a successive habeas petitioner has made a *prima facie* showing that his claim satisfies § 2244(b)(2)(B), authorizing him to file a successive habeas petition, the district court must automatically conclude that the petitioner has established a gateway actual-innocence claim sufficient to overcome AEDPA's one-year statute of limitations. In other words, if the panel concludes that a state prisoner successfully made it through the first gateway, he automatically makes it through the third gateway too.

No court has ever adopted this rule. Every court recognizes that a petitioner can benefit from the actual-innocence exception to AEDPA's limitations period only by "'persuad[ing] the district court that, in light of the new evidence, no jury, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Perkins*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329). And every court reads § 2244(b)(2)(B) to create a much more lenient standard at the permission-to-file stage: that section requires the petitioner to make a *prima facie* showing of actual innocence, which requires only "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Bennett*, 119 F.3d at 469; *accord Brown v. United States*, 906 F.3d 159, 161 (1st Cir. 2018); *Blow v. United States*, 829 F.3d 170, 172 (2d Cir. 2016); *In re Hoffner*, 870 F.3d 301, 308 (3d Cir. 2017); *In re Phillips*, 879 F.3d 542, 546 (4th Cir. 2018); *In re Davila*, 888 F.3d 179, 184 (5th Cir.

2018); *In re Watkins*, 810 F.3d 375, 379 (6th Cir. 2015); *Woods v. United States*, 805 F.3d 1152, 1153 (8th Cir. 2015); *Henry v. Spearman*, 899 F.3d 703, 706 (9th Cir. 2018); *United States v. Pullen*, 913 F.3d 1270, 1276 (10th Cir. 2019); *In re Henry*, 757 F.3d 1151, 1161 (11th Cir. 2014). These are very different standards.

Davis silently concedes that there is no circuit split. Despite asserting that the "[l]ower courts need guidance regarding the interplay between the various standards of actual innocence in habeas corpus cases," Pet. 10, he points to no split or confusion among the federal circuit courts (or even among district courts) on how to apply either § 2244(b)(2)(B)(ii) or the gateway actual-innocence standard articulated in *Schlup* and *Perkins*, *see* Pet. 10–15. The closest he comes is pointing to some decisions suggesting that making a *prima facie* case under § 2244(b)(2)(B)(2) requires showing a "reasonable likelihood" of ultimate success. Pet. 11–12. None of these courts purport to adopt a "reasonable likelihood" standard that differs from the deserving-fuller-exploration standard used in the cases cited in the previous paragraph—at most, the cases Davis cites are restating the same standard in different terms. *See, e.g.*, *In re Davila*, 888 F.3d at 184 (using both phrases). More importantly, none of these cases suggests that the *prima facie* standard applicable to § 2244(b)(2)(B)(ii) is equivalent to, or even similar to, the actual-innocence standard applicable when parties seek an exception to AEDPA's time bar. So there is no circuit split on the question presented. And without a circuit split, there is no reason for the Court to consider Davis's case.

That is especially true because Davis's argument fails on the merits. As the unanimity of the courts suggests, nothing in AEDPA's text supports his categorical rule. Neither do practical concerns—indeed, the practical concerns cut the other way. Davis's proposed rule would mean that every petitioner who successfully makes the *prima facie* showing under § 2244(b)(2)(B) is thereby entitled to take advantage of the actual-innocence exception. But for that to happen, either the *prima facie* standard would have to become drastically harder to meet or the actual-innocence standard would have to be come drastically easier to meet. Neither option is desirable. The first would make it almost impossible to file a successive petition, since the actual-innocence standard is "demanding." *Perkins*, 569 U.S. at 401. But the other option would make it too easy to satisfy the actual-innocence exception, thus undermining AEDPA's one-year limitations period—a key provision for stopping courts from too-frequently disrupting state convictions.

In sum, the Court cannot merge these two standards without depriving the permission-to-file procedure or the actual-innocence exception of its function. This reveals the error in Davis's assertion that "[i]nterpreting the two standards in the same manner is consistent with their purposes and effects." Pet. 13.

2. This is a bad vehicle for considering the question presented because Davis waived his argument by failing to raise it below and because he is not entitled to relief even under the rule he proposes.

Even if there were a split, this would be a bad vehicle for resolving it. For one thing, Davis waived his argument by failing to raise it in the Sixth Circuit. Second, Davis would lose even if the Court were to accept the rule he suggests.

First, consider waiver. As the foregoing suggests, there is no good argument that a circuit court's decision to permit a successive habeas petition automatically establishes actual innocence for purposes of timeliness. But even if there were, that argument is not properly before the Court, because Davis did not ask the lower courts to adopt it, *see* App. Br., No. 17-3262, Doc13, 28–40 (6th Cir.), and because the lower courts did not address the issue. The Supreme Court is "a court of review, not of first view." *Frank v. Gaos*, — U.S. —, No. 17-961, slip op., 6 (2019) (per curiam) (citation omitted). This is why the Court routinely denies petitions presenting issues "neither pressed nor passed upon below." *See Timbs v. Indiana*, 139 S. Ct. 682, slip op., 8 (2019).

Even if waiver were not an issue, this would be a bad vehicle for considering Davis's novel rule. The reason is that Davis's claim fails on the independent ground that he failed to satisfy the second gateway to securing relief in a successive habeas petition. Specifically, he failed to show that he is *in fact* entitled to relief under § 2244(b)(2)(B), under the more rigorous standard applicable at the district-court stage. In his petition for certiorari, Davis argues that the Sixth Circuit panel's authorization of his successive petition (the first gateway to review) means that he satisfied the actual-innocence showing needed to excuse his untimeliness (the third gateway to review). Pet. 14–15. But this matters only if Davis satisfies the *second* gateway to review, which requires proving by clear and convincing evidence that he is entitled to relief under § 2244(b)(2)(B)(ii). He did not, as the District Court rightly recognized. A-92; *see also* A-138. And although Davis challenged that holding in

the Sixth Circuit, he does not challenge it here. *See* Pet. 10–15. This issue is thus not before this Court, meaning the Court cannot award Davis relief even if it adopts his rule linking the first and third gateways.

Even if the issue were before the Court, there would be no basis for ruling in Davis's favor. First of all, this case is a recantation case. Courts across the country view (and have for a century viewed) witnesses' post-trial recantations with "utmost suspicion," both in habeas proceedings and "even on direct review" when defendants seek a new trial based upon newly discovered evidence. *Case*, 731 F.3d at 1041–42, 1043–44; *Harrison v. United States*, 7 F.2d 259, 262 (2d Cir. 1925); *see Brooks v. Tennessee*, 626 F.3d 878, 897 (6th Cir. 2010); *United States v. Wilson*, 624 F.3d 640, 663–64 (4th Cir. 2010); *Christian v. Frank*, 595 F.3d 1076, 1084 n.11 (9th Cir. 2010); *In re Davis*, 565 F.3d 810, 815 (11th Cir. 2009); *Mokhtar Haouari v. United States*, 510 F.3d 350, 353 (2d Cir. 2007) (collecting cases); *accord* A-85–86. This "great suspicion" is "proper[]," because recantation testimony "upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction." *See Bonney v. Wilson*, 754 F.3d 872, 886–87 (10th Cir. 2014) (emphasis deleted and citation omitted). This is why one circuit categorically holds that unsworn recantations can never "constitute 'evidence' within the meaning of 28 U.S.C. § 2244(b)(2)(B), much less '*clear* and *convincing*' evidence." *Mokhtar Haouari*, 510 F.3d at 354. And it explains why many other courts have found that even sworn recantations did not satisfy

§ 2244(b)(2)(B)'s standards in many individual cases, *see, e.g.*, *Lomack v. Farris*, 693 F. App'x 757, 761 (10th Cir. 2017); *Suggs v. United States*, No. 09CV775, 2010 U.S. Dist. LEXIS 114129, at *2–3 (S.D. Ill. Oct. 27, 2010).

Davis's case is even weaker than most recantation cases. This is not a case where a witness's later recantation would have surprised the jury. Rather, Avery's 2006 recantation amounted to just "another change" in an already-changed story. A-19. After all, the jury that convicted Davis did so "even after hearing about how Avery had recanted once before under oath, only later to rescind that recantation." A-18. The jury heard about "other changes in Avery's statements too," and "about Avery's opportunistic behavior, financial incentives to testify, and drug-related history." A-18. "Yet the jury still credited Avery's testimony implicating Davis," presumably because of the evidence that the prosecution presented that corroborated Avery's story. A-19. Given the circumstances of this case, it is no surprise that the District Court found that Davis had not shown by clear and convincing evidence that *no reasonable factfinder* would have found him guilty of Blakely's assault and murder, even with the benefit of another recantation. A-84. And there is no reason to think that the Sixth Circuit panel would, or should, reach any other conclusion.

But even if Davis had shown (or could show on remand) by clear and convincing evidence that no reasonable factfinder would have found him guilty of Blakely's assault and murder with the benefit of Avery's 2006 recantation, § 2244(b)(2)(B)(i) will *still* defeat Davis's claim unless he can show that "the factual predicate for the claim could not have been discovered previously through the exercise of due dili-

gence." The District Court did not decide whether Davis met the diligence requirement in § 2244(b)(2)(B)(*i*), because it concluded that Davis's failure to satisfy "§ 2244(b)(2)(B)(*ii*)" was "determinative." A-65 (emphasis added). But the first of these provisions gives one more reason to think that Davis would lose even if he won the narrow issue he is appealing. Avery signed an affidavit including his most recent recantation in February 2006, when one of Davis's accomplices finally found Avery after an eight year search. *See Cleveland v. Bradshaw*, 693 F.3d 626, 630 (6th Cir. 2012). This means that Avery's most recent recantation could have been discovered *more than seven years* before Davis actually discovered it. *See Johnson v. Dretke*, 442 F.3d 901, 908 (5th Cir. 2006) ("the plain text of § 2244(b)(2)(B) suggests that due diligence is measured against an objective standard, as opposed to the subjective diligence of the particular petitioner of record"). Based on this, the District Court concluded (in denying Davis's equitable-tolling argument) that "Davis did not pursue his rights diligently." A-100. He thus failed to satisfy the diligence requirement of § 2244(d)(2)(B)(i), and therefore is not entitled to relief under § 2244(b)(2)(B). What is more, Davis's delay gives yet another reason to doubt Davis's actual innocence—innocent men do not typically sit on their rights. *See Perkins*, 569 U.S. at 399–400.

In sum, Davis is not entitled to relief without regard to the Court's answer to the first question. If the Court is to answer the question at all, it should do so in case where its answer matters.

II. The Court should not review Davis's second question presented because it does not involve a circuit split, it is a bad vehicle for reviewing the question, and Davis is wrong on the merits.

With his second question presented, Davis asks this Court to adopt yet another new rule: every time a three-judge panel determines that a successive habeas petitioner has made a *prima facie* showing that his claim satisfies § 2244(b)(2)(B) and authorizes him to file a successive habeas petition, the district court must provide for "meaningful and comprehensive" "fuller exploration" of the petitioner's claims by "grant[ing] leave to conduct discovery, hold[ing] an evidentiary hearing, or both." Pet. 15–16.

This Court should deny review of this question for three reasons.

First, Davis does not assert any circuit split or confusion in the lower courts regarding whether and to what extent district courts ought to allow discovery in habeas cases arising under § 2244(b)(2)(B). Because Davis's second question presented is not the type of "important question of federal law" that justifies a grant without a split, the absence of a split is enough to defeat his request for certiorari. S. Ct. Rule 10.

Second, this case would be a bad vehicle in which to reconsider this area of law. Davis's delay in seeking discovery would likely have defeated his request for discovery *even if* discovery were generally available. He filed this successive habeas petition in November 2014 without requesting either an evidentiary hearing or the discovery he later requested. R29, PageID#3119 & n.6. He then waited "nearly eighteen [] months"—five months after both sides had "fully briefed" the case—to file a motion for leave to conduct discovery. R29, PageID#3119–20. Davis "offer[ed]

no explanation for his failure to request discovery earlier in the[] proceeding[]," nor could the court "discern [a] plausible reason for his late request." R29, PageID#3120.

In addition, Davis's late-filed request for discovery was "exceptionally broad." R29, PageID#3123. For example, he sought to depose (among others) Avery, the prosecutor, two detectives, and the Lorain County sheriff. And he demanded all documents pertaining to his prosecution. R29, PageID#3114–15. He did not "articulate[] sufficient reasons to allow this type of extensive discovery," nor did he "adequately explain[] what additional information he believe[d] he [would] obtain from discovery of the files concerning his own prosecution and the Blakely murder, beyond what he already obtained in discovery in his underlying criminal proceedings." R29, PageID#3123.

On top of all this, the District Court and Davis already had the evidence they needed to litigate his successive suit. Before Davis filed his suit, a court held an evidentiary hearing on Avery's reliability in a habeas proceeding involving one of Davis's accomplices. "This hearing included detailed testimony regarding many of the issues relating to Avery's credibility that [were] at stake" here, so the District Court expanded the record to include the transcript and exhibits from that hearing. R29, PageID#3123. Further discovery would likely have been duplicative, though the District Court promised to "revisit the issue" if it found that "additional discovery [was] necessary" to resolve Davis's claims. R29, PageID#3124.

In light of these considerations, the District Court did not abuse its discretion when it determined that "[a]dditional discovery at [that] late stage in the proceeding would require duplication of effort and would be a waste of judicial resources." R29, PageID#3120.

Finally, the rule for which Davis advocates is inconsistent with longstanding principles applicable in habeas cases. "A habeas petitioner, unlike the usual civil litigant, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Whether, and to what extent, discovery is available is committed to the discretion of the district court upon a showing of good cause by a habeas petitioner. Rules Governing § 2254 Cases 6(a); *accord Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Davis's proposed categorical rule is therefore not the law. Indeed, at least one circuit has considered and rejected Davis's proposed rule. *Goldblum v. Klem*, 510 F.3d 204, 218–21 (3d Cir. 2007), *cert. denied sub nom. Goldblum v. Kerestes*, 555 U.S. 850 (2008). It should do the same here.

CONCLUSION

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

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