No. _____

In the Supreme Court of the United States

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, DIRECTOR,

Petitioner,

v.

KAYLA JEAN AYERS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A person in state custody has one year to file a habeas petition. Usually, that one year runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. §2244(d)(1)(A). But AEDPA restarts the clock in certain limited circumstances. Relevant here, the clock restarts when a previously undiscoverable "factual predicate" becomes discoverable to someone acting with "due diligence." 28 U.S.C. §2244(d)(1)(D).

When a prisoner obtains new support for a previously-available claim, does that mean she has a new "factual predicate" that restarts her clock?

LIST OF PARTIES

The petitioner is the Director of the Ohio Department of Rehabilitation and Correction.

The respondent is Kayla Jean Ayers.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Ayers*, 2013-Ohio-5402 (5th Dist.).
2. *State v. Ayers*, 2022-Ohio-1910 (5th Dist.), *appeal not allowed*, 167 Ohio St. 3d 1528 (2022).
3. *Ayers v. Ohio Dep't of Rehab. & Corr.*, No. 5:20-CV-1654, 2023 WL 4931928 (N.D. Ohio Aug. 2, 2023).
4. *Ayers v. Ohio Dep't of Rehab. & Corr.*, 113 F.4th 665 (6th Cir. 2024).

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INTRODUCTION

The Ninth Circuit used to stand alone in creating a gaping loophole to the habeas time limits. The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a one-year time limit for filing a habeas petition, but it restarts that clock if a petitioner could not have previously discovered the "factual predicate" for her claim. Eight circuits have recognized that discovering new support for a previously available claim is not the same as learning a new "factual predicate" that restarts the one-year clock. And they have noted that holding otherwise would essentially erase the time limit altogether.

The Sixth Circuit has now joined the Ninth in holding the opposite. In those circuits, petitioners can take advantage of a new one-year clock by simply discovering new support, like a new expert opinion, to challenge long-settled judgments.

This split implicates the State's strong interests in finality. A state court's criminal judgment may no longer be "conclusive on all the world." *Brown v. Davenport*, 596 U.S. 118, 129 (2022) (quoting *Ex parte Watkins*, 28 U.S. 193, 202–03 (1830)). But the States still hold a "sovereign interest" in the finality of their judgments. *Brown v. Davenport*, 596 U.S. 118, 133, (2022) (quotation and brackets omitted). This Court should intervene now to resolve the split and explain whether newly acquired support qualifies as a "factual predicate" under AEDPA that rewinds the clock that protects the State judgment's finality.

OPINIONS BELOW

The District Court dismissed Ayers's petition for a writ of habeas corpus for untimeliness on August 2,

2023. *Ayers v. Ohio Dep't of Rehab. & Corr.*, No. 5:20-CV-1654, 2023 WL 4931928 (N.D. Ohio Aug. 2, 2023). On August 26, 2024, the Sixth Circuit reversed the District Court and remanded for further proceedings. App.2a. The Sixth Circuit's opinion is published at *Ayers v. Ohio Dep't of Rehab. & Corr.*, 113 F.4th 665 (6th Cir. 2024).

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case under 28 U.S.C. §1331. The Sixth Circuit had jurisdiction under 28 U.S.C. §1291. The Sixth Circuit issued its opinion and judgment on August 26, 2024. This petition timely invokes this Court's jurisdiction under 28 U.S.C. §§1254(1), 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2244(d)(1) states:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) 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;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT

Kayla Ayers lived with her toddler son, her father, and her father's family. App.2a. Ayers apparently relied on her father for financial support, and she threatened to burn his house down if he ever tried to leave. App.3a.

On the very day Ayers's father announced his plans to leave, Ayers lit a mattress on fire in the basement of his house. *Id.* Ayers offered two different stories to explain the fire to investigators. *Id.* First, she said that her son had lit the mattress on fire while he was playing with a lighter. *Id.* Then she changed her mind and said that she had fallen asleep with a cigarette and ignited the mattress by accident. *Id.* But she then reverted to the first story and again blamed her son. *Id.*

At trial, the State presented evidence that Ayers had started the fire. The State's fire expert testified that the mattress appeared to have two ignition points, meaning that Ayers's story about an accidental ignition was less likely. App.5a. The State also informed the jury of Ayers's previous threats to burn the house down. *Ayers v. Ohio Dep't of Rehab. & Corr.*,

Dir., No. 5:20-CV-01654-SL, 2023 WL 4935917, at *9 (N.D. Ohio June 14, 2023), *report and recommendation adopted* 2023 WL 4931928 (N.D. Ohio Aug. 2, 2023). It also pointed out that Ayers was the only adult present when the fire began, had been covered in soot, and gave conflicting stories about how the fire started. *Id.*

Ayers's counsel unsuccessfully fought back. He attempted to impeach the State's expert by pointing out inconsistencies in his reports and testimony. App.5a. He did not retain an expert of his own or question the qualifications of the State's expert. *Id.* The jury convicted, and the court sentenced her to seven years' imprisonment followed by three years of post-release control. *Id.* Ayers lost her direct appeal, *id.*, and her window for seeking further review expired in 2014, *State v. Ayers*, 2013-Ohio-5402, ¶¶28, 34 (5th Dist.).

About five years later, Ayers secured counsel from the Ohio Innocence Project. App.5a–6a. The Project hired an expert, John Lentini, who wrote a report attacking the State's expert. App.6a. He wrote that the State's expert was wrong in how he interpreted the evidence, lacked the qualifications to testify about the cause of the fire, and used methods that were "unreliable, unscientific, and at odds with generally accepted fire investigation methodology." *Id.* (quotation omitted).

About six years after Ayers's direct review had ended, she filed a habeas petition that raised, among other things, an ineffective-assistance claim. App.6a. The District Court dismissed the petition as time-barred. *Id.* The Sixth Circuit granted a certificate of appealability on the ineffective-assistance claim and reviewed the District Court's timeliness ruling. *Id.*

First, the Sixth Circuit set out to determine the "factual predicate" of Ayer's ineffective-assistance claim. App.8a. It started by defining the factual predicate as "the 'vital facts' underlying the claim." *Id.* (quoting *Rivas v. Fischer*, 687 F.3d 514, 535 (2d Cir. 2012)). For an ineffective assistance claim, the panel said the factual predicate includes "facts showing that (1) counsel's performance was objectively deficient, and (2) the deficient performance prejudiced the petitioner." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). It held that "Lentini's report provides the factual predicate for Ayers's claim because it provides facts supporting the claim's merits such that a court would not dismiss it sua sponte." App.10a.

Second, the Sixth Circuit determined when Ayers could have discovered Lentini's report through the exercise of due diligence. App.11a. The panel accounted for the fact that Ayers "was an indigent prisoner." App.12a. That meant Ayers could never had discovered Lentini's report on her own, since it was "not in the prison library" nor in "publicly available sources." *Id.* She simply had "no way of accessing the contents of Lentini's report until he produced it." App.14a. And she "could not have known the basis for her ineffective-assistance claim until an expert explained that [the State's expert] was unqualified." App.16a.

The Sixth Circuit reversed and remanded for further proceedings.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's ruling widened a circuit split on a topic of great importance to the States. The circuits do not agree on whether newly discovered support for a previously available claim can qualify as a "factual predicate." That means that the effective

habeas deadlines for state prisoners vary wildly depending on which State holds them in custody. It also means that, for States in the more permissive circuits, finality of criminal convictions will likely erode.

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

AEDPA imposes limits on habeas petitions. One such limit is the "1-year period of limitation" on a habeas petition filed "by a person in custody pursuant to the judgment of a State court." 28 U.S.C. §2244(d)(1). That one-year clock starts on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* It may also restart in three circumstances: when the State previously created an "impediment to filing," when this Court has recognized a new "constitutional right," or when a previously undiscoverable "factual predicate of the claim" becomes discoverable "through the exercise of due diligence." *Id.*

This case involves the meaning of the term "factual predicate." Some circuits have held that a factual predicate is the underlying fact that the claim is about. Others have held that a factual predicate includes factual support for a previously available claim. When a prisoner obtains some new support for a previously-available claim, does that mean she has a new "factual predicate" that restarts her clock? In the First, Second, Third, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits, the answer is "no." In the Sixth and Ninth Circuits, the answer is "yes."

A. The First, Second, Third, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits do not restart the habeas clock for new support.

The eight circuits on one side of the split have rejected various claims to restart the habeas clock. These circuits interpret "factual predicate" to mean the core background facts that underlie the habeas claim. Purported new support comes in many forms, and circuits have rejected them as sources of the factual predicate. Most analogous to this case, the Second Circuit has rejected new expert reports. Other circuits have also rejected previously undiscovered evidence, new affidavits, and new understandings of legal significance.

Expert Reports. Most relevant here, the Second Circuit rejected a similar claim that a new expert report revived an otherwise untimely habeas petition. There, the petitioner had been convicted largely because his alibi did not overlap with the State's expert's estimated time of death. *Rivas v. Fischer*, 687 F.3d 514, 526–27 (2d Cir. 2012). Later, he obtained an expert report opining that the State's time-of-death estimate was probably wrong, meaning that he had a solid alibi. *Id.* at 531. He filed a habeas petition alleging (as relevant here) false testimony at trial and ineffective assistance. *Id.* at 534. He argued that the new report was a new factual predicate. *Id.* at 536.

The Second Circuit held that the new report did not restart the clock. It explained that a "factual predicate" is "only … the 'vital facts' underlying the claim." *Id.* at 535 (quoting *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007)). That does not include "new information [that] is discovered that merely supports or

strengthens a claim that could have been properly stated without the discovery." *Id.* Were it otherwise, "the statute of limitations would fail in its purpose to bring finality to criminal judgments, for any prisoner could reopen the judgment by locating any additional fact." *Id.* (quotation omitted). It also explained that "[c]onclusions drawn from preexisting facts, even if the conclusions are themselves new, are not factual predicates for a claim." *Id.*

Based on that concept of the term "factual predicate," the Second Circuit found Rivas's claim untimely. The new expert affidavit was not a factual predicate for the false-testimony claim; it was "a *conclusion* based on facts that were known to Rivas or discoverable by him or his counsel at the time of his trial." *Id.* at 536. And for the ineffective-assistance claim, the factual predicates were the errors themselves, which were "made prior to or during Rivas's trial" and thus discoverable then. *Id.* at 537.

New Evidence. Five Circuits have rejected the discovery of supporting evidence as a new factual predicate. The Eighth Circuit is perhaps the best example. The petitioner argued that "the factual predicate for his ineffective assistance of counsel claims arose during state postconviction proceedings," when he developed his legal theories and found the evidence for them. *Martin v. Fayram*, 849 F.3d 691, 696–97 (8th Cir. 2017). But the Eighth Circuit held that the petitioner knew the factual predicates for his ineffective-assistance claims "before the conclusion of his direct appeal." *Id.* at 696. After all, his claims against trial counsel were based on "his counsel's failure to object" to certain statements by the prosecutor. *Id.* He "was already aware of" that failure "by the conclusion of the trial." *Id.* And his claims against appellate

counsel were based on "appellate counsel's failure to raise [an ineffective-assistance] claim on appeal." *Id.* at 697. And he knew of that failure "as soon as he had read the brief filed on his behalf." *Id.* at 697 (quotation omitted). "That [the petitioner] may not have recognized the legal significance of these facts at the time they occurred, or may have wanted to develop additional evidence, does not mean he was not actually aware of the vital facts supporting a Sixth Amendment claim before the conclusion of his direct appeal." *Id.*

The Third and Seventh Circuits have rejected the idea that discovering new supporting evidence from the government creates a new factual predicate. In the Third Circuit, a petitioner claimed that his discovery of government correspondence supporting his argument formed the factual predicate for his claim that the State illegally denied him parole and required him to attend a sex-offender program. *McAleese v. Brennan*, 483 F.3d 206, 208–09, 212–14 (3d Cir. 2007). The Third Circuit held that the "factual predicate" for each of McAleese's claims was the denial of parole and the requirement of participating in the sex offender program. *Id.* at 214. In arguing otherwise, McAleese had "confused the facts that make up his claims with evidence that might support his claims." *Id.* In the Seventh Circuit, a petitioner claimed that his factual predicate was yet to be discoverable because the government had not turned over a form that might explain why the police sought a hair sample from a potential additional suspect. *Johnson v. McBride*, 381 F.3d 587, 588–89 (7th Cir. 2004). But the petitioner "would have known himself whether [the additional suspect also] participated" in the crime, so he already knew the factual predicate for his claim. *Id.* at 589.

"A desire to see more information in the hope that something will turn up" is not the same as a factual predicate. *Id.*

The Fifth and Tenth Circuits have rejected claims that new supporting affidavits are new factual predicates. In the Fifth Circuit the affidavit was from the estranged trial attorney, and it supported a habeas claim for failure to inform the petitioner of his trial rights. *Flanagan v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998). The court explained that the petitioner was "confusing his knowledge of the factual predicate of his claim with the time permitted for gathering evidence in support of that claim." *Id.* The affidavit was just supporting evidence—it "neither change[d] the character of" the claim "nor provide[d] any new ground for [the] habeas petition." *Id.* at 199. In the Tenth Circuit, the petitioner obtained a recanting affidavit from a witness who had identified the petitioner at trial as the culprit. *Taylor v. Martin*, 757 F.3d 1122, 1122–23 (10th Cir. 2014). The Tenth Circuit held that the "factual predicate" for this claim was the witness's original testimony itself, not the affidavit recanting. *Id.* 1123–24. "Taylor knew or should have known that [the] testimony was false when he heard [the witness] testify to something Mr. Taylor knew to be untrue." *Id.* at 1123–24. Thus, the factual predicate "was discovered, or could have been discovered," on the day the witness testified. *Id.* at 1123.

The Circuits have also explained why the deadline for habeas petitions does not wait for the discovery of evidence. As a legal matter, "[k]nowledge of the vital facts of a claim may be distinct from knowledge of their legal significance … or from evidence used to support the claim." *Fayram*, 849 F.3d at 696 (quotation omitted). And as a practical matter, a habeas

petitioner is not required to "present all of the evidence to support his claims" in the petition. *McAleese*, 483 F.3d at 215. He can seek discovery after filing the petition. *Id.* So there is no reason to "delay the triggering of the running of the limitations period until all evidence in support of a petition is secured." *Id.*

New Legal Understanding. The First and Eleventh Circuits have rejected new legal understanding as a new factual predicate. In the First Circuit, a petitioner claimed that his new realization was a new factual predicate: he found out long after pleading guilty that the sentence reduction he hoped for was not possible because of his mandatory sentence. *Holmes v. Spencer*, 685 F.3d 51, 53–54 (1st Cir. 2012). The First Circuit held that the factual predicate for his claim was "[t]he principal facts upon which this claim is predicated—that [he] originally intended to go to trial; that his attorney instead convinced him to plead guilty; and that this course of action was influenced by his expectation of a subsequent sentence reduction." *Id.* at 59. Those facts "were known, at the latest, by the date of his conviction." *Id.* The petitioner's claimed factual predicate—that his attorney's "advice may have been flawed" and may have been "the foundation for an ineffective assistance claim"—are not factual predicates, but only "the legal consequences of those facts." *Id.* In the Eleventh Circuit, the petitioner claimed that he did not understand his trial rights before he pleaded guilty. *Cole v. Warden, Georgia State Prison*, 768 F.3d 1150, 1156–57 (11th Cir. 2014). The court held that Cole "knew or should have known" about those rights "at the time of his plea" because they were listed on the plea form. *Id.* at 1157. Learning about the legal significance of those rights later did not restart the clock. *Id.*

B. The Sixth and Ninth Circuits restart the habeas clock for new support of a previously-available claim.

As they are both ineffective-assistance cases, the Sixth and Ninth Circuits' opinions follow a similar pattern. Both identify the factual predicate as what counsel would have discovered if he had acted as effective counsel. Both assert that the petitioner could not have submitted a habeas petition without the later-acquired supporting evidence. And both identify the relevant time as when the petitioner, acting on their own after trial, could have discovered the new support. Based on that analysis, habeas cases in these circuits come out opposite of how they would have in the other eight circuits.

Sixth Circuit. As discussed above, the Sixth Circuit held that the "factual predicate" for Ayers's claim was Lentini's expert report. App.10a. And without Lentini's report supporting the ineffective-assistance claim, the court posited, a district court would have "dismiss[ed] it sua sponte." *Id.* The court concluded that Ayers could not have discovered Lentini's report earlier because it "was not in the prison library" and was not discoverable with "diligent research through publicly available sources." App.12a.

Ninth Circuit. Years after his conviction for murder, a petitioner filed a habeas petition alleging ineffective assistance for failure to investigate juror tampering at his trial. *Hasan v. Galaza*, 254 F.3d 1150, 1151–52 (9th Cir. 2001). During the trial, several people had seen a witness from a different trial approach one of Hasan's jurors and tell him to call her. *Id.* at 1152. His counsel did not investigate the incident, so he did not discover that the witness from the other

trial was in a romantic relationship with a witness at Hasan's trial. *Id.* at 1152–53. Had Hasan's counsel known about the relationship, he may have been able to use it to win his motion for a new trial by refuting prosecution's statement that the jury tamperer had "no connection with the defendant's case in any way whatsoever." *Id.* at 1154 (quotation omitted).

The Ninth Circuit held that the discovery of the romantic relationship was the "factual predicate" that restarted the habeas clock. *Id.* at 1154. The court reasoned that, "to have the factual predicate for a habeas petition based on ineffective assistance of counsel, a petitioner must have discovered (or with the exercise of due diligence could have discovered) facts suggesting both unreasonable performance *and* resulting prejudice." *Id.* So it did not matter that Hasan "knew at [trial] that there may have been jury tampering and that his counsel did not properly investigate it or request a continuance to do so." *Id.* Hasan still "did not know … the added facts that such an investigation would have revealed." *Id.* And without the support of the romantic relationship, the court concluded, Hasan could not have asserted ineffective assistance on habeas. *Id.*

* * *

If Ayers had brought her case in any of the thirty States within the eight circuits on the one side of the split, there is no doubt her case would have been dismissed as untimely. The Second Circuit, for example, would have considered her new expert report to be a "[c]onclusion[] drawn from preexisting facts," not a factual predicate. *Rivas*, 687 F.3d at 535. Or in the Eighth Circuit, the court would have noted that she "was already aware of" her counsel's failure to hire an

independent expert "by the conclusion of the trial." *Fayram*, 849 F.3d at 696. In other words, the split is meaningful and cannot be explained away by differing facts.

II. The question presented is important.

Those different interpretations lend themselves to dramatically different effective deadlines. In the Sixth and Ninth Circuits, prisoners can enjoy a reset clock when organizations step in as post-conviction counsel and plumb for new evidence, no matter how long after the direct appeal. Other prisoners are not so fortunate.

Besides inequitably different regimes for prisoners, this disparity impacts the core powers of the States to administer their criminal laws. What is more, the interpretation of the term "factual predicate" implicates two other provisions with similar finality concerns.

A. The issue implicates federalism, finality, and the administration of state criminal law.

Whether to restart a prisoner's habeas clock is no small matter. Habeas review "entails significant costs, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Davila v. Davis*, 582 U.S. 521, 537 (2017) (internal citation and quotation omitted). The one-year time limit promises the States an eventual end to those costs and reflects respect for the State's "well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179 (2001).

The Sixth and Ninth Circuit's outlier positions create particular disruption because they revive the

stalest cases. "[T]he passage of time only diminishes the reliability of criminal adjudications." *Herrera v. Collins*, 506 U.S. 390, 403 (1993). For the State, "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle v. Isaac*, 456 U.S. 107, 127–28 (1982). Because the Sixth and Ninth Circuits' error results in restarting the time limit, it will revive only cases that should fail precisely because they are so old. In other words, by creating a loophole in the time limit, the case below expands the universe of habeas cases by adding only those that *most implicate* the States' interest in repose.

Indeed, the circuits that have rejected the Sixth and Ninth Circuits' permissive interpretation have explained why that regime invites chaos. If any new support can reset the habeas clock, "the statute of limitations would fail in its purpose to bring finality to criminal judgments, for any prisoner could reopen the judgment by locating any additional fact." *Rivas*, 687 F.3d at 535 (quotation omitted). And just like ordinary litigants, habeas petitioners can file their petitions as "the first step in a habeas corpus proceeding" and then pursue discovery. *McAleese*, 483 F.3d at 215. It makes little sense to treat habeas petitioners—and only them—as if their limitations period does not start "until all evidence in support of [their] petition is secured." *Id.*

To compound the harm, the Sixth Circuit assumed that Ayers on her own could *never* discover the factual predicate because she was an indigent prisoner. App.12a. That means that indigent prisoners like Ayers—and there are many—have nothing to do but wait for an organization like the Innocence Project to decide to take up their cases. Whatever the new

counsel finds will have been effectively undiscoverable to the layperson waiting behind bars before the new attorney arrives. After all, "few prisoners are lawyers." *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000), *as amended* (Jan. 22, 2001). This makes the schedules of postconviction counsel the master of the deadline. At some point, the deadline "might as well not exist." *Id.* But limiting the meaning of "factual predicate" to the true core facts of the claim eliminates this loophole because the baseline fact of a claim (for example, that counsel failed to object) is something the petitioner can know when it happens.

B. The answer may influence multiple provisions using the same terminology.

Misconstruing the term "factual predicate" may impact provisions other than just this time limit. AEDPA also restricts "second or successive" habeas petitions unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. §2244(b)(2)(B)(i). And it limits federal courts' ability to hold an evidentiary hearing unless the petitioner's failure to develop a state-court record was because the "factual predicate … could not have been previously discovered through the exercise of due diligence." 28 U.S.C. §2254(e)(2)(A)(ii).

Because of the similarities among these three provisions, courts interpreting one of the three may draw on the other two for guidance. *See Bracey v. Superintendent Rockview SCI*, 986 F.3d 274, 287–88 (3d Cir. 2021). "[T]he normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same

meaning." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). And insofar as the interpretation of the term "factual predicate" in those provisions bears on this case, the Sixth Circuit's holding here breaks from other circuits on that front as well. *See, e.g.*, *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1358–59 (11th Cir. 2007) (interpreting 28 U.S.C. §2244(b)(2)(B)(i)); *In re Davila*, 888 F.3d 179, 185 (5th Cir. 2018) (same); *Henry v. Ryan*, 720 F.3d 1073, 1085 (9th Cir. 2013) (interpreting 28 U.S.C. §2254(e)(2)(A)); *Newbury v. Stephens*, 756 F.3d 850, 869 (5th Cir. 2014) (same).

For that reason, the Sixth Circuit's decision threatens to undermine this Court's recent rulings. In *Shinn v. Ramirez*, this Court explained the extremely high "bar for excusing a prisoner's failure to develop the state-court record." *Shinn v. Ramirez*, 596 U.S. 366, 381 (2022). But it matters much less what the phrase "failed to develop the factual basis" means, §2254(e)(2), if petitioners can trigger "sprawling evidentiary hearing[s]" and "wholesale relitigation of … guilt" more easily by invoking a capacious definition of the factual predicate. *Shinn*, 596 U.S. at 388; *see* §2254(e)(2)(A)(ii). This Court applied *Shinn* when explaining that a transportation order for medical testing was improper when the evidence gathered would be barred from consideration. *Shoop v. Twyford*, 596 U.S. 811, 820 (2022). It explained that "expanding the state-court record" when AEDPA barred an evidentiary proceeding "would 'prolong federal habeas proceedings with no purpose.'" *Id.* (quoting *Shinn*, 596 U.S. at 390). But an expanded concept of the factual predicate increases the probability that courts will find evidentiary proceedings—and their attendant procedures—permissible under AEDPA.

III. This case is a good vehicle for resolving the question presented.

This case presents an ideal vehicle for resolving the meaning of "factual predicate." The timeliness of Ayers's petition is the only issue on appeal, and all agree on the facts that tee up the question. So there are no factual disputes or interfering holdings to bind up the Court's consideration.

Moreover, this case presents a clear roadmap of how to abuse the habeas system to bring back the stalest of habeas claims. If Ayers's new expert report can qualify as a previously unavailable factual predicate, it is hard to imagine what could not. As such, this case provides the Court a golden opportunity to lay down a limiting principle—something the Sixth and Ninth Circuits currently lack, much to the harm of their constituent States.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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