No. 24-584

In the Supreme Court of the United States

ANNETTE CHAMBERS-SMITH, Director,
Ohio Department of Rehabilitation and Correction,
Petitioner,

v.

KAYLA JEAN AYERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The petition fails to present a legal question warranting review. Every court of appeals, including the court below, agrees that "the factual predicate of [a] claim" arises under 28 U.S.C. § 2244(d)(1)(D) when a habeas petitioner possesses or should have possessed the "vital facts" that make the habeas claim plausible. Pet. App. 8a (collecting circuits). The answer to the question presented—whether "new support for a previously-available claim" means there is a "a new 'factual predicate' that restarts [the habeas] clock" (Pet. i)—is thus uncontroversial. In the Sixth Circuit, like every other circuit, the answer is *no*.

Because the court below applies precisely the same legal rule as every other circuit, petitioner instead bakes into the question presented a naked request for error correction. As petitioner frames it, the petition addresses circumstances where a habeas claimant merely "obtains new support for a *previously-available* claim." Pet. i (emphasis added). But the court below did not hold that the clock restarts in that circumstance. Instead, it meticulously explained why respondent's claim was *not* previously available. See Pet. App. 12a-16a.

Though petitioner apparently disagrees with the court's conclusion that Ms. Ayers's ineffective-assistance claim was not previously available, petitioner never challenges the court's analysis of that issue. Nothing in the question presented raises the issue of when a claim is previously available. Nor does the rest of the petition ever put the issue into dispute. It is now forfeited. And for good reason: Not only is there no circuit conflict regarding when a claim is previously unavailable, but the issue is also highly fact sensitive.

The Court should deny the petition, which does not present any question warranting review.

STATEMENT

A. Factual background

1. Kayla Ayers and her three-year-old son lived with Ms. Ayers's father. D. Ct. Doc. 15-1 at 100. On October 3, 2012, Ms. Ayers noticed signs of a fire and managed to flee with her son. Pet. App. 3a. A neighbor witnessed the two escape and recalled Ms. Ayers being "very upset" over the possibility of losing custody of her children due to the fire. *Ibid.* The Massillon Fire Department responded and extinguished a burning mattress in the basement of the house. *Ibid.* While Ms. Ayers suffered a cut to her hand while trying to extinguish the fire, no serious injuries occurred. *Ibid.*

Ms. Ayers has maintained that the fire was an accident, potentially caused by her son playing with a lighter or from a cigarette. Pet. App. 3a. Reginald Winters, a fire inspector for the Massillon Fire Department, interviewed Ms. Ayers's son and determined the child was capable of igniting the lighter. *Ibid.* Nonetheless, Winters contended that someone had likely started the fire intentionally based on his view—which turned out to be unsupported—that the mattress fire had two ignition points. *Id.* at 5a.

2. The State charged Ms. Ayers with aggravated arson and child endangerment. Pet. App. 3a. At trial, the State relied on Winters to substantiate its version of events. Winters supplied an initial expert report claiming that "some type of open flame" ignited the mattress and that "he believed to a reasonable level of 'scientific certainty' that a 'deliberate act of a person' caused the fire." *Id*. at 4a (citation omitted). To support these claims, Winters cited the National Fire

Protection Association's Guide for Fire and Explosion Investigations (or the NFPA 921 manual). *Id.* at 3a-4a.[1]

Winters then produced a revised summary that he presented at trial. Pet. App. 4a. He based his conclusions on "examin[ing] the fire scene, interviewing witnesses, interviewing the insured and using the levels of scientific certainty as discussed in the 2011 edition of NFPA 921; A Guide for Fire and Explosion Investigation." *Ibid.* (citation omitted). Winters opined that the mattress fire had two ignition points; as a result, Winters contended that the fire was likely started intentionally. *Id.* at 5a.

The prosecution hinged its case on Winters's testimony, arguing that the presence of two ignition points meant the fire could not have been accidental. Pet. App. 5a. In its closing statement to the jury, the prosecution relied on the supposed dual ignition points to discount alternative explanations for the fire: "[T]here's only two other plausible explanations [besides arson] as it's been stated"—"that it was a cigarette, but it had to be two cigarettes because we got two points of origin because fire doesn't hop from one side to the other, so the other plausible explanation is [her son] started the fire * * * So then he has to crawl over that burning mattress and come over here to the front side of it and light this part on fire. That's plausible?" D. Ct. Doc. 15-2 at 455.

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[1] Winters's report contained several glaring errors. It continually used the term "[i]nsured," even though the matter had no relation to an insurance claim. Pet. App. 4a. It described involvement of a "Chris Thomas" instead of Ms. Ayers. *Ibid.* And it contained a mixture of information from former investigations and other cases. *Ibid.* Winters testified that these were typographical errors stemming from his use of template reports. *Ibid.*

Ms. Ayers's pretrial public defender never consulted a fire expert or inspector in preparing her defense. Pet. App. 5a. Nor did the public defender who took over the case two weeks before trial. *Ibid.* At trial, Ms. Ayers's counsel impeached Winters with his multiple inconsistent reports but never challenged Winters's qualifications as an expert, his scientific methodology for discerning the fire's cause, or the substance of his conclusions. *Ibid.* The jury convicted Ms. Ayers, and the court sentenced her to seven years' imprisonment and three years of post-release control. *Ibid.*

3. Ms. Ayers maintained her innocence and repeatedly sought new information regarding the fire and her trial. Pet. App. 6a. On July 29, 2019, John Lentini, a "renowned fire-inspection expert" and one of the principal authors of the NFPA 921 manual that Winters used to reach his conclusions about the fire, produced an expert report demonstrating that the Winters report was "unequivocally" unreliable as a matter of expert testimony. *Ibid.*; see also D. Ct. Doc. 15-1 at 237-238. Specifically, the Lentini report established that Winters's methods were "complete bunk" (Pet. App. 14a), calling into question his expert qualifications. These facts revealed, for the first time, that Ms. Ayers's counsel's failure to investigate Winter's qualifications or the substance of his report was highly prejudicial to her defense.

Regarding the prosecution's primary theory, Lentini found that Winters's "proposition that this fire had two points of origin is unsupportable by any generally accepted methodology." D. Ct. Doc. 15-1 at 237. Lentini explained that there was "no credible means of determining more than one origin [of the fire] on" the mattress. *Id.* at 239. Further, "[t]he damage [wa]s indistinguishable from damage caused by normal fire

spread from a single point of origin." *Id.* at 240. Rejecting Winters's methods, Lentini explained that Winters "conflate[d] the presence of two 'V-patters' with two origins" (*id.* at 240) and that his "entire approach to examining bedsprings [was] flawed" (*id.* at 242). Lentini therefore found that Winters's exclusion of Ms. Ayers's son as starting the fire rested entirely on "circular logic." *Id.* at 242.

Further, referencing the manual that he coauthored, Lentini determined that "Winters disregarded [NFPA 921's] guidance in several important ways [d]espite claiming to follow [it]." D. Ct. Doc. 15-1 at 242. After thoroughly scrutinizing the fire evidence and Winters's testimony, Lentini concluded that Winters "is not qualified to investigate fires per NFPA 1033, the generally accepted industry standard." *Id.* at 238.

As Lentini would conclude, Winters's investigative methodology was "unreliable, unscientific, and at odds with generally accepted fire investigation methodology," and Winters demonstrated an utter lack of the qualifications necessary to perform these methods. Pet. App. 6a (citation omitted). Lentini's report thus made Ms. Ayers aware of both Winters's unsound methods and his lack of qualification to perform arson investigations—vital facts she could not have known without the report and that her trial counsel never developed.

B. Proceedings below

After the Lentini report revealed the flaws in the Winters report, Ms. Ayers filed a federal habeas petition alleging ineffective assistance of counsel on July 27, 2020. Pet. App. 6a. The district court dismissed her petition as untimely under 28 U.S.C.

§ 2244(d)(1)(D) and declined to grant a certificate of appealability. *Ibid.*

The court of appeals granted a certificate of appealability; it then reversed and remanded for further proceedings. Pet. App. 2a-16a. The court concluded that the production of the Lentini report served as a new factual predicate for Ms. Ayers's claim under Section 2244(d)(1)(D), triggering a new one-year limitations period from the date of the report's discovery. *Id.* at 16a. As the court discussed, that inquiry contains three components: (1) the factual predicate for the claim; (2) due diligence in discovering the factual predicate; and (3) comparing the date of the claim to the date the factual predicate should have been discovered with due diligence. *Id.* at 7a-8a.

First, regarding factual predicate—the sole legal question presented by the petition—the court recognized widespread "agree[ment] that 'a factual predicate consists only of the "vital facts" underlying the claim,'" citing harmonious precedent from the Second, Third, Fifth, Seventh, Eighth, and Eleventh Circuits. Pet. App. 8a (quoting *Rivas* v. *Fischer*, 687 F.3d 514, 535 (2d Cir. 2012)). Applied to Ms. Ayers's circumstances, the court explained that an ineffective-assistance-of-counsel claim requires facts demonstrating both the deficient performance and prejudice prongs of the test articulated in *Strickland* v. *Washington*, 466 U.S. 668 (1984). See Pet. App. 8a. The court concluded that "Lentini's report provides the factual predicate for Ms. Ayers's claim because it provides facts supporting the claim's merits such that a court would not dismiss it sua sponte." *Id.* at 10a. The report showed not only that her counsel's performance was deficient, but, because it revealed that a challenge to the Winters report had a reasonable probability of changing the outcome of the trial, it also established

that she was prejudiced by the deficient performance. *Ibid.* Ms. Ayers could not have made this showing prior to discovering the facts contained in the Lentini report. *Ibid*.

Second, regarding the separate due-diligence prong, the court held that Ms. Ayers exercised diligence in discovering this factual predicate for her ineffective-assistance claim for two independent reasons. Pet. App. 12a. The court reasoned that no diligence obligation attached until Ms. Ayers obtained the Lentini report because Ms. Ayers "could not have diligently pursued a claim that she" had no idea might exist. *Id.* at 16a. And it also concluded, in a fact-specific analysis, that Ms. Ayers could not have obtained the information disclosed in the Lentini report any sooner than she did. *Id.* at 12a-16a. That is, "[n]o amount of diligent research through publicly available sources would have shown [Ms. Ayers] that Winters was unqualified," and she could not have known "that Winters's analysis was not scientifically sound simply by hearing his testimony." *Id.* at 12a. The court thus explained that Ms. Ayers needed an expert report to discover the factual basis for her ineffective-assistance claim, and in her circumstances, she could not have gotten one sooner. *Id.* at 12a-13a. The production of the Lentini report was the soonest she could have discovered the factual predicate of her claim, making her receipt of the report the proper start date of the one-year clock.

Regarding the third element, it is undisputed that Ms. Ayers filed her claim within one year of receiving the Lentini report. See Pet. App. 16a.

REASONS FOR DENYING THE PETITION

Review is unwarranted. Every circuit employs the same definition of "factual predicate"—indeed, the

court below expressly (and approvingly) drew on authority from many of the circuits petitioner claims to be on the other side of a supposed split. The petition thus fails to identify any disagreement among the lower courts over the question presented. More, this case is a poor vehicle for review because the petition presents *no* question on what appears to be the real crux of petitioner's disagreement with the court below: when and whether Ms. Ayers's claim was "previously available." Pet. i. Petitioner is also wrong that this case raises any urgent issues, not least because it identifies no daylight between the Sixth Circuit's approach and petitioner's preferred legal standard. Finally, though all petitioner really seeks is error correction, that request, too, is fruitless, as the decision below correctly applied the undisputed legal framework to the particular facts of this case.

A. There is no conflict on the question presented.

1. The courts are not divided on the question presented. The petition asks this Court to determine whether "new support for a previously-available claim" can serve as "a new 'factual predicate' that restarts [the habeas] clock." Pet. i. But the circuits—the Sixth included—uniformly agree that the answer to this question is "no." See, *e.g.*, *Rivas* v. *Fischer*, 687 F.3d 514, 535 (2d Cir. 2012); *Schlueter* v. *Varner*, 384 F.3d 69, 74 (3d Cir. 2004); *Martin* v. *Fayram*, 849 F.3d 691, 695 (8th Cir. 2017); see also *Jefferson* v. *United States*, 730 F.3d 537, 547 (6th Cir. 2013) ("[N]ew information discovered 'that merely supports or strengthens a claim that could have been properly stated without the discovery * * * is not a 'factual predicate' for purposes of triggering the statute of limitations under § 2244(d)(1)(D).'") (quoting *Rivas*, 687 F.3d at 535).

Just as in the decision below, *every* circuit defines "factual predicate" the same way: the factual predicate consists of only the facts necessary to allege such that a habeas petition will not be dismissed for failure to satisfy all the elements of the claimed relief. See *Holmes* v. *Spencer,* 685 F.3d 51, 59 (1st Cir. 2012) (defining the "factual predicate" as the "principal facts upon which [the habeas] claim is predicated"); *Rivas*, 687 F.3d at 535 ("[A] factual predicate consists only of the 'vital facts' underlying the claim[.] * * * The facts vital to a habeas claim are those without which the claim would necessarily be dismissed.") (quoting *McAleese* v. *Brennan*, 483 F.3d 206, 214 (3d Cir. 2007)); *In re Young*, 789 F.3d 518, 528 (5th Cir. 2015) (defining the "factual predicate" as "the date a petitioner is on notice of the facts which would support a claim"); *Owens* v. *Boyd*, 235 F.3d 356, 359 (7th Cir. 2000) (establishing that "[s]ection 2244(d)(1)(D) gives defendants the benefit of a later start if *vital facts* could not have been known by the date the appellate process ended") (emphasis added); *Earl* v. *Fabian*, 556 F.3d 717, 725 (8th Cir. 2009) ("[T]he factual predicate of a petitioner's claims constitutes the vital facts underlying those claims.") (quoting *McAleese*, 483 F.3d at 214)); *Ford* v. *Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012) (the "clock starts ticking when a person knows or through diligence could discover the vital facts, regardless of when their legal significance is actually discovered."); *Purkey* v. *Kansas*, 281 F. App'x 824, 827 (10th Cir. 2008) (quoting the standard articulated in *Rivas*); *Cole* v. *Warden*, *Ga. State Prison*, 768 F.3d 1150, 1155 (11th Cir. 2014) (recognizing that the "factual predicate" must include "the underlying 'vital facts' of a petitioner's claim").

The court below applied precisely the same legal standard, holding "that 'a factual predicate consists

only of the "vital facts" underlying the clam[,]" and explaining that a "fact is 'vital' if it is required for the habeas petition to overcome sua sponte dismissal." Pet. App. 8a (quoting *Rivas*, 687 F.3d 514 and citing decisions from the Second, Third, Fifth, Seventh, and Eleventh circuits). The Sixth Circuit thus agrees with every other circuit that new support for a previously available claim does not supply a "factual predicate" that restarts the limitations clock. *Ibid.*; see also *Jefferson*, 730 F.3d at 547 (recognizing the same rule). Below, it held instead that Ms. Ayers's claim was *not* previously available. Pet. App. 11a ("Ayers could not have gleaned [Lentini's] opinions from another source.").

The petition fails to offer any reason why the court of appeals' fact-intensive holding that Ms. Ayers's claim was not previously available is worthy of review, or even why that conclusion was wrong. Instead, the petition simply assumes the essential premise that Ms. Ayers's claim was previously available and presents the question as if the court below agreed that it was previously available but nonetheless found her claim timely. It did not.

2. The petition claims that the circuits are "split" on the nature of the factual predicate inquiry and justifies the supposed split by pointing to a handful of cases from other circuits finding habeas claims untimely, whereas the court here found the claim timely. Pet. 6-11. But because all circuits apply a consistent legal framework, the disparate outcomes the petition identifies stem entirely from disparate facts, not from any divergence over the proper legal standard. And none of petitioner's cases suggest that any other circuit would have reached a different outcome if faced with the facts of Ms. Ayers's case.

First Circuit. *Holmes* v. *Spencer* (Pet. 11) applied the identical framework as the court below. Compare 685 F.3d at 59 (basing the factual-predicate inquiry on "evidentiary facts or events * * * [not] legal consequences of the facts") (quoting *Brackett* v. *United States*, 270 F.3d 60, 69 (1st Cir. 2001)), with Pet. App. 8a (basing the factual-predicate inquiry on "the 'vital facts' underlying the claim") (quoting *Rivas*, 687 F.3d at 535)).

There, the habeas petitioner filed an ineffective-assistance-of-counsel claim alleging that, but for his attorney's mistaken advice at the pleading stage, he would have filed a motion to revise his sentence under Massachusetts state law. *Holmes*, 685 F.3d at 55-56. The First Circuit held the claim untimely because the petitioner had discovered no new facts necessary to state a plausible claim for habeas relief; rather he had come to understand the legal significance of facts known to him at the time of his conviction. *Id.* at 59. By contrast, the Lentini report supplied new *facts* regarding Winters's lack of qualifications and unscientific methods that were previously unavailable to Ms. Ayers at trial. Pet. App. 10a-11a. *Holmes* is thus entirely inapposite. There is a material difference between a habeas petitioner (like in *Holmes*) who develops a belated understanding of the *legal significance* of facts he knew all along and a habeas petitioner (like here) who uncovers new, previously undiscoverable facts that establish a habeas claim that would have been dismissed had she been unable to allege them.

Second Circuit. *Rivas* v. *Fischer* (Pet. 7-8) likewise reached a different result purely because of distinguishable facts and context, not legal disagreement. Indeed, the court below relied heavily on *Rivas* to frame the legal standard. See Pet. App. 8a.

Unlike the ineffective-assistance-of-counsel claim here, in *Rivas*, the habeas petitioner raised a claim under *Napue* v. *Illinois*, 360 U.S. 264 (1959), alleging that the prosecution presented false testimony from a medical examiner. *Rivas*, 687 F.3d at 535-536.[2] The *Rivas* petitioner attempted to support that claim by offering evidence undermining the credibility of the medical examiner's testimony, including a new expert report confirming that the original expert's "trial testimony [had] ignored generally accepted scientific principles and arrived at a time-of-death estimate that was highly implausible." *Id.* at 536.

The Second Circuit applied the same legal standard for identifying a "factual predicate" as the court below, but it held that all the facts necessary to assert a plausible *Napue* claim were "known to Rivas or discoverable by him" at the time of his trial. 687 F.3d at 536. That included "[the expert's] conclusions," which "were based upon a review of the medical examiner's file and the transcript of Rivas's criminal trial, in particular [the medical examiner's] testimony." *Ibid*. On the facts of that case, the factual predicate was thus the "information upon which [the new expert] relied in forming his conclusion[s]," as these conclusions were based entirely on information the habeas petitioner knew or could have discovered earlier, without needing an expert to weigh in. *Ibid.* Additionally, much of the medical examiner's false testimony focused on autopsy slides of the victim's brain—testimony that would have been clearly false to the

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[2] The *Rivas* habeas petitioner also raised ineffective-assistance claims, but the court distinguished those claims from the claims premised on the medical-examiner issue. See, *e.g.*, 687 F.3d at 534, 537 (distinguishing the medical-examiner-related claims from the ineffective-assistance claims).

petitioner at the time of the trial because no such slides existed. *Ibid.* The *Rivas* court noted, moreover, that even if the new expert report was the factual predicate, the claim was still untimely by eight months. *Ibid*.

Here, petitioner has made no similar showing that Ms. Ayers knew or could have known of the facts disclosed in the Lentini report any sooner. Instead, Ms. Ayers only discovered (and only could have discovered) the facts necessary to undercut Winters's credentials and methodology, and thereby establish counsel's prejudicially deficient performance, through that report.

Third Circuit. The Third Circuit's decision in *McAleese* v. *Brennan* (Pet. 9) likewise employs the same "factual predicate" standard as did the court below. Compare 483 F.3d 206, 214 (3d Cir. 2007) (defining "factual predicate" in terms of "vital facts"), with Pet. App. 8a (same). But in *McAleese,* the habeas petitioner knew the relevant facts underlying his claim (that the parole board pretextually denied him release), yet he delayed filing his federal petition while he pursued other avenues for relief and acquired additional evidence to bolster his claim. 483 F.3d at 214. Here, by contrast, the court concluded that Ms. Ayers did not know (and could not have known through the exercise of due diligence) the vital fact to sustain a plausible ineffective-assistance-of-counsel claim: that Winters's testimony was "complete bunk," and thus prior counsel's deficient performance in failing to challenge his testimony was highly prejudicial to Ms. Ayers's defense. Pet. App. 10a-11a, 14a n.2. Accordingly, nothing in *McAleese* suggests that the Third Circuit would view Ms. Ayers's case differently than did the court below.

Fifth Circuit. *Flanagan* v. *Johnson* (Pet. 10) similarly applies the same legal standard as the court below. Compare 154 F.3d 196, 198-199 (5th Cir. 1998) (distinguishing discovery of key facts from efforts to gather additional evidence), with Pet. App. 8a (citing *Flanagan*). But that case reached a different outcome than this one based on factual distinctions. There, the factual predicate of the petitioner's due-process-based habeas claim—that his counsel never informed him of his right not to testify—was known by the petitioner all along. *Flanagan*, 154 F.3d at 198-199. A later-produced affidavit by that counsel in which that counsel "implicitly support[ed]" the contention that the petitioner was not informed of his right not to testify therefore did not constitute new "knowledge of the factual predicate." *Id.* at 199. It was merely additional "evidence in support of th[e] claim." *Ibid*. Here, by contrast, Ms. Ayers did not (and could not) have known of the facts disclosed in the Lentini report any sooner. Pet. App. 10a-11a.

On facts actually comparable to those here, applying another subsection of Section 2244 containing identical language, the Fifth Circuit has reached the same outcome as the decision below. In *In re Swearingen*, the petitioner asserted that his attorney had failed to develop adequate biological evidence to challenge the length of time the victim's body had been left in the forest. 556 F.3d 344, 346 (5th Cir. 2009) (applying 28 U.S.C. § 2244(b)(2)(B)(i)). The Fifth Circuit agreed and found timely an ineffective-assistance claim based on counsel's failure to develop expert histological evidence. *Id.* at 349. The court explained that the factual predicate was the expert's analysis of a tissue sample and that this factual predicate "could not have been previously discovered" "[b]ecause Swearingen's [new] expert * * * was unable

to analyze this evidence until" after trial. *Ibid.* *Swearingen* thus demonstrates that the Fifth Circuit would likely reach the very same outcome as the decision below.

Seventh Circuit. The cases petitioner invokes (Pet. 9-10, 16) also fail to demonstrate a divergent approach from the decision below. The court in *Johnson* v. *McBride* rejected as the factual predicate of the habeas petitioner's *Brady* claim materials showing that police had suspected a potential co-participant in the crime but did not disclose that suspicion to the habeas petitioner. 381 F.3d 587, 588 (7th Cir. 2004). As the court explained, the later discovery of the additional suspect was not a new factual predicate because the habeas petitioner's own participation was not in dispute, and he thus would have known all along whether the alleged co-participant also participated. *Id.* at 589. The vital fact—the existence of the co-participant—was thus actually known to the habeas petitioner already.

The Seventh Circuit's decision in *Owens* v. *Boyd* (Pet. 16), like the First Circuit's decision in *Holmes*, involved a petitioner who was already aware of the factual predicate of his habeas claim but attempted to restart the statute of limitations after freshly realizing the "legal significance" of these known facts. 235 F.3d 356, 359 (7th Cir. 2000). As explained already, unlike the petitioners in *Owens* and *Holmes*, Ms. Ayers's habeas claim is premised on previously unknown *facts* disclosed in the Lentini report about Winters's lack of qualifications and improper methods, not merely the legal consequences of previously known facts.

Eighth Circuit. *Martin* v. *Fayram* (Pet. 8-9) is factually distinguishable from the present case on the

same grounds as *Holmes* and *Owens*. As in those cases, in *Martin*, the habeas petitioner previously knew of the factual predicate of his ineffective assistance of counsel claim: "his trial counsel's failure to object to certain aspects of the prosecution's closing argument." 849 F.3d 691, 696 (8th Cir. 2017). Because "[petitioner] was already aware" of this fact "by the conclusion of the trial," he was not able to reset the statute of limitations because the *legal significance* of that fact only dawned on him later. *Id.* at 696-697. Here, by contrast, Ms. Ayers could not have plausibly alleged facts to satisfy *both* elements of her ineffective-assistance claim until she was aware of the facts in the Lentini report, which established that prior counsel's failure to challenge Winters's credentials or the substance of his report prejudiced her defense.

Ninth Circuit. Contrary to the petition (Pet. 12-13), the Ninth Circuit applies the same framework as every other circuit. See *Ford* v. *Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012) ("[The] clock starts ticking when a person knows or through diligence could discover the vital facts, regardless of when their legal significance is actually discovered."). It is thus no surprise that, when faced with facts similar to this case, it reached the same outcome. In *Hasan* v. *Galaza*, the petitioner filed an ineffective-assistance claim after learning that the partner of a key prosecution witness engaged in jury tampering and that his attorney had failed to adequately investigate the incident. 254 F.3d 1150, 1152-1154 (9th Cir. 2001). The court acknowledged that Hasan had "knowledge at the time of trial of some facts," including his attorney's failure to investigate potential jury tampering. *Id.* at 1154. But, just like here, the petitioner had lacked "a good faith basis for arguing prejudice"—*Strickland*'s second prong—until he later learned of the particular

relationship between the witness and the individual engaged in jury tampering. *Ibid.* That material factual discovery provided the requisite factual predicate to raise a plausible ineffective-assistance claim and thus obtain the benefit of Section 2244(d)(1)(D)'s statute-of-limitations reset.

Tenth Circuit. *Taylor* v. *Martin* (Pet. 10) is also factually distinguishable. That case does not involve an ineffective-assistance claim and instead involves a claim premised on a witness recanting his testimony. 757 F.3d 1122, 1123 (10th Cir. 2014). The court explained that the habeas petitioner knew during trial that the witness lied on the stand and failed to show that he could not have pursued the claim sooner. *Id.* at 1124. The witness's later recantation thus did not provide a *new* factual predicate but merely strengthened a claim that the petitioner could already have brought. Here, by contrast, Ms. Ayers could not have brought her claim until she discovered facts establishing that Winters's testimony was not credible.

A panel in the Tenth Circuit, moreover, has approvingly cited the Ninth Circuit's decision in *Hasan* when considering a case in which an ineffective-assistance claim turned on later-discovered facts. See *Hancox* v. *Allbaugh*, 707 F. App'x 528, 530 (10th Cir. 2017) ("Accordingly, '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.'") (quoting *Hasan*, 254 F.3d at 1154). Petitioner's attempt to position those circuits on opposite sides of a supposed split is thus incorrect—no such split exists.

Eleventh Circuit. *Cole* v. *Warden, Georgia State Prison* (Pet. 11) also does not contradict the court's approach below. Like several other cases cited in the petition and discussed above, the Eleventh Circuit held that "[t]ime begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." 768 F.3d 1150, 1157 (11th Cir. 2014) (quoting *Owens*, 235 F.3d at 359). The habeas petitioner in *Cole* failed to satisfy this standard, as his claim that he was not apprised of his rights under *Boykin* v. *Alabama*, 395 U.S. 238 (1969) until years after entering his guilty plea was disproven by the fact that he signed a form informing him of those rights at the time of his plea. *Cole*, 768 F.3d at 1157. He was thus aware of those rights on the date he signed that form. Here, however, as explained, Ms. Ayers did not and could not have discovered the "important facts" (*ibid.*) she needed to pursue an ineffective-assistance claim until she obtained Lentini's report.

3. The **Sixth Circuit**'s case law confirms that there is no circuit conflict. Where different facts exist—more comparable to those in the cases from other circuits cited in the petition—the Sixth Circuit has rejected ineffective-assistance claims premised on new expert evidence as untimely.

In *Stokes* v. *Leonard*, a panel in the Sixth Circuit considered an ineffective-assistance claim based on trial counsel's failure to call an expert witness to counter the scientific testimony of a state expert witness. 36 F. App'x 801, 804-805 (6th Cir. 2002). But, as noted in the decision below, "the expert in *Stokes* did not provide a scientific opinion, but instead identified a body of available evidence that counsel failed to use." Pet. App. 11a. "Because the data were publicly available and were useful without an expert's interpretation,

the petitioner's claim did not rely on facts or opinions only an expert witness could have provided to him." *Ibid.* The court thus rejected the expert report as a new factual predicate for an ineffective-assistance claim. 36 F. App'x at 805. Another panel did likewise in *Boyer* v. *Robey*, rejecting the habeas petitioner's claim as untimely because it found that the petitioner "was aware of the facts supporting his ineffective-assistance claim before he received [the expert's] letters." 2024 WL 3052322, at *2 (6th Cir. Jan. 9, 2024).

The different outcome below does not break with the legal standard employed in these cases. It merely turns on the presence of facts absent in those cases, but present in this one, showing that Ms. Ayers discovered a new factual predicate for an ineffective-assistance claim after obtaining Lentini's report. See Pet App. 10a-11a. As already noted above, the Sixth Circuit in *Jefferson* years ago embraced precisely the legal standard petitioner advocates, stating that "new information discovered 'that merely supports or strengthens a claim that could have been properly stated without the discovery * * * *is not* a 'factual predicate' for purposes of triggering the statute of limitations under § 2244(d)(1)(D).'") (emphasis added) (quoting *Rivas*, 687 F.3d at 535).

Additionally, in the months since the court below issued its decision, district courts in the Sixth Circuit have continued to apply a "factual predicate" standard consistent with that of every other circuit, further demonstrating that the supposed split is illusory. Indeed, in many decisions, district courts have deemed habeas petitioners' claims untimely. See *Murphy* v. *Robey*, 2024 WL 4502094, at *3 (E.D. Ky. Oct. 16, 2024) ("[E]vidence presented by a habeas petitioner does not form a 'vital fact' where it is 'merely *cumulative* to the evidence *already presented by the defense at*

trial.") (quoting *Souter* v. *Jones*, 395 F.3d 577, 587 (6th Cir. 2005)); *Houston* v. *Tanner*, 2024 WL 4361952, at *13 (E.D. Mich. Sept. 30, 2024) ("[T]he term 'factual predicate' means the facts underlying the claim—and the factual predicate date is not based on the collection of evidence to support the facts."). The decision below has *not* changed the way that courts in the Sixth Circuit evaluate ineffective-assistance claims.

Beyond demonstrating that no split exists, these cases also put to bed petitioner's claim that the decision below creates "federalism, finality," and "administration" concerns necessitating review. Pet. 14-15. Contrary to the contention in the petition that the decision below will allow the reopening of any "stale[]" case in which "any new support" for a previous claim is found (Pet. 15), district courts applying the decision below have had no trouble finding that stale cases, lacking a genuinely new factual predicate, remain time-barred.

The factual predicate requirement, moreover, is not the only provision in Section 2244(d) protecting finality and respect for state-court judgments. Courts in the Sixth Circuit—like courts across the country—routinely find that petitioners' claims are untimely because they could have discovered the factual predicate sooner but failed to exercise due diligence—an independent element of the statute not addressed by the petition, much less in the question presented. See, *e.g.*, *Hoss* v. *Braman*, 2025 WL 28444, at *2-3 (E.D. Mich. Jan. 3, 2025) (finding a petitioner "did not meet his burden of showing that he could not have discovered his [factual predicate] sooner"); *Stokes*, 36 F. App'x at 804-805 (finding a petitioner could have realized the existence of his claim without needing his own expert); *Jefferson*, 730 F.3d at 548-549 (finding a

petitioner could have discovered the factual predicate of his claim during his trial).

* * *

The decision does not create or deepen a circuit split. Every circuit applies the same legal standard to determine the "factual predicate" for a habeas claim. The cases from other circuits cited in the petition reached different outcomes because the petitioners *knew* the vital facts far before the event they later claimed was the new factual predicate that altered the limitations period. But Ms. Ayers, like the petitioners in *Hasan* (from the Ninth Circuit) and *Swearingen* (from the Fifth Circuit), did not earlier know the facts that are now vital to her claim. The petition does not demonstrate that any other circuit faced with the facts of *this* case would reach a different outcome.

B. This case is a poor vehicle for review.

The petition demonstrates no compelling reason to grant the petition. There is no divergence on the question presented—which does not accurately describe petitioner's true disagreement with the decision below. Meanwhile, the four circuits that have confronted similar facts—ineffective-assistance claims premised on subsequently obtained expert testimony—have reached consistent results. This uniformity, and the infrequency that this circumstance arises, undercut petitioner's contention that immediate review is necessary. The decision below neither frustrates this Court's prior holdings nor conflicts with the "factual predicate" analysis implicated in other AEDPA sections. Finally, this case suffers from a jurisdictional defect; if the Court were to grant the petition, it would need to resolve whether the petition was timely filed when it arrived on the 91st day after the judgment below.

1. This case does not turn on the question presented.

The question presented assumes that Ms. Ayers's claim was previously available. Pet. i ("When a prisoner obtains new support for a previously-available claim, does that mean she has a new 'factual predicate' that restarts her clock?"). But the Sixth Circuit held that Ms. Ayers's claim was *not* "previously available." See Pet. App. 16a. As the court explained, she could not have brought her ineffective-assistance claim before she received Lentini's report—making the report the "factual predicate" for her claim. Pet. App. 9a-11a. Nor could she have reasonably obtained the Lentini report sooner. *Ibid.* The petition never confronts these essential, fact-bound conclusions. It simply assumes them away.

By framing the question as one in which Ms. Ayers's underlying claim was "previously available" and the Lentini Report merely provided "new support" (Pet. i), the petition disregards the reasoning of the decision below to present a question on which no court actually disagrees. Even if there were any controversy over the correct answer to that question (see *supra* 8-21), this case is an exceptionally poor vehicle to address that question. After all, the decision below does not implicate the timeliness of previously available claims. Yet the petition nowhere justifies the need for certiorari on any other question. Granting this petition would thus either result in an advisory opinion about an undisputed legal point or a bait-and-switch at the merits stage on an unidentified question of unknown significance. See S. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("[W]e ordinarily do not consider questions outside those presented in the petition for certiorari.").

2. The precise circumstances in this case arise infrequently and should percolate.

Although the question presented—regarding whether new support for a previously available claim is a "factual predicate"—arises with some frequency, there is no divergence on the answer to that question. See *supra* at 8-21. On the other hand, the circumstances of this case—the timeliness of ineffective-assistance claims that require new expert testimony to discover—is rather rare. We are aware of only a handful of instances (and petitioner cites none), in addition to this case, in which the courts of appeals have addressed such circumstances post-AEDPA. See *Gray* v. *Ballard*, 848 F.3d 318, 323-324 (4th Cir. 2017); *Stokes*, 36 F. App'x at 804-805; *Boyer*, 2024 WL 3052322 at *2. See also *Swearingen*, 556 F.3d at 349 (holding a new expert report to be the factual predicate of an ineffective-assistance claim under the comparable Section 2244(b)(2) standard). Cf. *Hasan*, 254 F.3d at 1150 (analyzing the timeliness of an ineffective assistance of counsel claim premised on new non-expert testimony). Close inspection of these cases reinforces that the circuit courts are not divided on how to analyze them. Each applies the same legal framework to reach consistent results that turn on nothing but the individual facts of each case. Some petitioners identified a new factual predicate that might not have been discoverable earlier (see Pet. App. 11a; *Hasan*, 254 F.3d at 1155; *Swearingen*, 556 F.3d at 349), and other petitioners' claims were rejected as untimely where the factual predicate existed earlier (see *Gray*, 848 F.3d at 323-324; *Stokes*, 36 F. App'x at 805; *Boyer*, 2024 WL 3052322, at *2).

Moreover, these cases have arisen against a backdrop of circuits uniformly agreeing that the Section 2244(d)(1)(D) "factual predicate" "consists only of the

'vital facts' underlying the claim." Pet. App. 8a; *supra* at 8-10. Circuit consensus on the applicable legal standard combined with the relative infrequency claims arising under comparable circumstances shows that the issue is not of pressing concern and would benefit from further percolation. If this becomes an issue warranting review, a petition will surely come to the Court without the various defects, including the jurisdictional one, that this petition has.

3. There are no broader implications necessitating immediate review.

As noted (*supra* 19-21), the petition is wrong to suggest that the decision below undermines the finality of state court judgments, as the Sixth Circuit's legal analysis is no different from that applied by other courts. The decision below also would not upend other statutory frameworks. Contra Pet. 16-17. The circuits all construe the term "factual predicate" consistently across statutory contexts. Because the decision below is consistent with the way that other circuits apply the "factual predicate" inquiry (*see supra* at 8-21), the cases the petition cites interpreting other AEDPA provisions that use the same phrase are likewise in accord with the decision below.

The petition strangely—and tellingly—contends that the decision below risks breaking with the Ninth Circuit's application of Section 2254(e)(2)(A) (Pet. 17 (citing *Henry* v. *Ryan*, 720 F.3d 1073, 1085 (9th Cir. 2013)), despite arguing elsewhere that the Sixth Circuit and Ninth Circuit are aligned against the rest of circuit courts in applying the identical "factual predicate" standard under Section 2244(d)(1)(D). And it also suggests a break with the Fifth Circuit's application of the "factual predicate" requirement under Section 2244(b)(2)(B)(i) (Pet. 17) (citing *In re Davila*, 888

F.3d 179, 185 (5th Cir. 2018)), though, as noted, another Fifth Circuit case analyzing that subsection reached the same outcome as the decision below when applying quite similar facts. See *supra* at 14-15; *Swearingen*, 556 F.3d at 346, 349.

What is more, the cases the petition cites applying the "factual predicate" standard in different contexts are, once again, examples of cases applying the same *legal* standard regarding a claim's factual predicate that the Sixth Circuit employs, but arriving at different outcomes based on different facts. *Jordan* v. *Secretary, Department of Corrections* concerned a successive petition under 28 U.S.C. § 2244(b)(2)(B) in which the petitioner incontrovertibly already knew the factual predicate for a coerced-confession claim because it concerned *his own* interrogation and confession. 485 F.3d 1351, 1358-1359 (11th Cir. 2007) ("[Jordan] not only could have discovered those facts, he actually did know them."). The same was true in *In re Davila*, where the petitioner had full knowledge of the factual predicate of his claim throughout his trial "because he himself would know whether he had taken drugs on the day of the murders and that [an acquaintance] would have seen him in such a state." 888 F.3d at 185. There is no divergence in the legal framework between these cases and the decision below—the difference in outcome stems entirely from the difference in fact pattern.

The same is true of Section 2254(e)(2)(A)(ii)'s evidentiary-hearing bar. The petitioner in *Henry* v. *Ryan* "not only suspected but alleged and had evidentiary support for his claim more than a decade before commencing federal habeas proceedings," precluding an

evidentiary hearing. 720 F.3d at 1083.[3] The court of appeals here found that Ms. Ayers did not know the factual basis for her ineffective-assistance claim at an earlier point; that (unchallenged) fact-bound distinction makes all the difference.

The petition is also wrong to contend (at 17) that the decision below in any way undermines *Shinn* v. *Ramirez*, 596 U.S. 366 (2022), which addressed whether lower courts could equitably allow a federal evidentiary hearing if the habeas petitioner could not fit within the "narrow limits" of Section 2254(e)(2)(A). *Id.* at 371. *Shinn* had nothing to do with the meaning of "factual predicate" in the Section 2254(e)(2)(A) exception because the habeas petitioners there "concede[d] that they d[id] not satisfy § 2254(e)(2)'s narrow exceptions." *Id.* at 382.[4] The Court's discussion of "sprawling evidentiary hearing[s]" and "wholesale relitigation" concerned petitions that lacked a new factual predicate. Pet. 17 (quoting *Shinn*, 596 U.S. at 388). As we have already shown, the interpretation of "factual predicate" in the decision below accords with that of every other circuit, and different outcomes turn entirely on differences in facts.

The petition has not even attempted to show that there is mass relitigation in the Sixth Circuit or the Ninth Circuit as a result of the alleged circuit split.

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[3] The petition also cites *Newbury* v. *Stephens*, 756 F.3d 850, 869 (5th Cir. 2014) (per curiam). See Pet. 17. But that referenced page quotes the state's argument regarding Section 2254(e)(2)(A)(ii), not the court's analysis of the issue. In fact, the court did not find the petitioner's claim to be procedurally barred but denied a certificate of appealability on the merits. See *Newbury*, 756 at 871-874.

[4] The petition's reference to *Shoop* v. *Twyford*, 596 U.S. 811 (2022), is similarly misplaced; *Shoop* likewise did not address the meaning of "factual predicate."

The lack of any divergence in the legal framework—with cases in each circuit coming out harmoniously on similar fact patterns—confirms that there will not be.

4. The petition may have been jurisdictionally out of time.

The petition suffers another defect that renders it a poor vehicle—it may have been jurisdictionally out of time.

Section 2101(c) of Title 28 of the U.S. Code permits the filing of a petition for a writ of certiorari "within ninety days after the entry of [a] judgment." The decision below became final on August 26, 2024. Pet. App. 1a. By operation of Section 2101(c), petitioner needed to file a petition within 90 days—by Sunday, November 24, 2024. But petitioner did not seek an extension of time and did not file the petition until the following Monday, November 25, 91 days after the judgment became final.[5]

To be sure, the Court long ago held that "the considerations of liberality and leniency which find expression in" Federal Rule of Civil Procedure 6(a) spill over into Section 2101(c); the Court thus allowed an automatic extension of the filing deadline until Monday when the ninetieth day falls on a weekend. *Union Nat'l Bank* v. *Lamb*, 337 U.S. 38, 41 (1949). More recently, however, the Court has clarified that the "90-day limit is mandatory and jurisdictional" and thus the Court has "no authority to extend the period for filing except as Congress permits." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). The "mandatory and

[5] Although the State obtained an extension of time to seek rehearing in the court of appeals, it did not actually file a rehearing petition. This case thus does not implicate Supreme Court Rule 13.3.

jurisdictional" nature of Section 2101(c)'s 90-day deadline (*ibid.*) would require the Court's reconsideration of *Lamb* if it were to grant certiorari in this case.

The Court's recent grant of certiorari in *Velazquez* v. *Garland*, 144 S. Ct. 2714 (2024), calls into question the continued vitality of Court-created weekend rollover rules. If the Court finds for the government in *Velazquez*, then it will need to review its decades-old decision in *Lamb* to take jurisdiction over this case, given that Ohio filed its petition outside of Section 2101(c)'s 90-day window.

As Justice Thomas has recognized, this question—whether a petition for certiorari due over the weekend extends automatically to the next business day—raises "threshold questions about the timeliness of the petition for certiorari that might preclude us from reaching" the merits of a case. See *California Bldg. Indus. Ass'n* v. *City of San Jose*, 577 U.S. 1179, 1179 (2016) (Thomas, J. (concurring in the denial of *certiorari*). To even reach the merits, the Court would need to resolve this jurisdictional issue first.

C. The decision below is correct.

Review is additionally unwarranted because the decision below is correct.

1. To bring an ineffective-assistance claim, a habeas petitioner must allege (1) "deficient performance" falling "below an objective standard of reasonableness" and (2) "that there was prejudice as a result." *Harrington* v. *Richter*, 562 U.S. 86, 104 (2011). To have the "factual predicate of [a] claim" of ineffective assistance (28 U.S.C. § 2244(d)(1)(D)), a habeas petitioner accordingly must have facts suggesting both deficient performance and prejudice. Pet. App. 8a; *Hasan*, 254 F.3d at 1154; *Hancox*, 707 F. App'x at 530.

See also *Swearingen*, 556 F.3d at 346, 348-349 (holding the same under 28 U.S.C. § 2244(b)(2)(B)(i)).

A defense lawyer's failure to consult with or call an expert witness can, in some circumstances, constitute deficient performance. See *Knott* v. *Mabry*, 671 F.2d 1208, 1212-1213 (8th Cir. 1982) ("Where there is substantial contradiction in a given area of expertise, it may be vital in affording effective representation to a defendant in a criminal case for counsel to elicit expert testimony rebutting the state's expert testimony."); *Lindstadt* v. *Keane*, 239 F.3d 191, 202 (2d Cir. 2001) (finding deficient performance where a defense counsel failed to call an expert); *Holsomback* v. *White*, 133 F.3d 1382, 1387 (11th Cir. 1998) (similar); *United States* v. *Tucker*, 716 F.2d 576, 581 (9th Cir. 1983) (same with respect to financial records).

But the mere fact that a lawyer failed to consult with or call an expert cannot alone establish prejudice. To make that showing, petitioners typically must identify a specific expert "whose testimony would have altered the outcome of [their] trial." *Earhart* v. *Johnson*, 132 F.3d 1062, 1068 (5th Cir. 1998); see also *Day* v. *Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009) ("To prevail on an ineffective assistance claim based on counsel's failure to call a witness, the petitioner must * * * set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense."); *Rodela-Aguilar* v. *United States*, 596 F.3d 457, 462 (8th Cir. 2010) (holding that an expert-witness-based ineffective-assistance claim "requires evidence of what a scientific expert would have stated at trial in order to establish *Strickland* prejudice") (quotation marks omitted). Under Ohio law, "[a] claim of ineffective assistance of counsel that is dependent on facts that are not part of the trial record cannot be raised on direct appeal.

Instead, it must be raised in a post-conviction proceeding pursuant to Ohio Rev. Code § 2953.21." *Gunner* v. *Welch*, 749 F.3d 511, 514 (6th Cir. 2014).

The court of appeals correctly applied this framework in determining the "factual predicate of [Ms. Ayers's ineffective-assistance] claim." 28 U.S.C. § 2244(d)(1)(D). It acknowledged that trial counsel's failure to "consult an arson expert" when the case "center[ed] on the fire's cause" plausibly suggests deficient performance. Pet. App. 9a. But Ms. Ayers still lacked any facts to suggest that this failure prejudiced her case. After all, nothing on the face of Winters's testimony could have apprised a non-expert like Ms. Ayers that his scientific methods lacked any foundation. Without an expert of her own, Ms. Ayers lacked the facts necessary—the identity of an expert "whose testimony would have altered the outcome of [her] trial"—to suggest she suffered any prejudice. *Earhart*, 132 F.3d at 1068. Only upon obtaining an expert report unmasking the errors of Winters's report—which she ultimately obtained in the Lentini Report—did Ms. Ayers have sufficient factual material to allege that Winters was unqualified and used an unsupportable methodology "such that a court would not dismiss [her ineffective-assistance claim] sua sponte." Pet. App. 10a.

2. The second element of the Section 2244(d)(1)(D) timeliness inquiry—when the factual predicate "could have been discovered through the exercise of due diligence"—is not implicated by the question presented nor challenged in the petition and is accordingly forfeited. Nonetheless, the court below correctly concluded that Ms. Ayer's could not have discovered the factual predicate of her claim any sooner than when she did by receiving the Lentini report.

Due diligence can be shown through "prompt action" as soon as a petitioner is "in a position to realize" the existence of a potential claim. *Johnson* v. *United States*, 544 U.S. 295, 308 (2005); see also, *e.g.*, *Bracey* v. *Superintendent Rockview SCI*, 986 F.3d 274, 286-287 (3d Cir. 2021); *Moore* v. *Knight*, 368 F.3d 936, 940 (7th Cir. 2004) (28 U.S.C. § 2244 does not require 'the maximum feasible diligence' but only 'due,' or reasonable diligence.") (quoting *Wims* v. *United States*, 225 F.3d 186, 190 n.4 (2d Cir.2000)). The due diligence inquiry asks when a reasonable person in the habeas petitioner's circumstances could have objectively realized the potential claim, making the analysis inherently fact-intensive—a point upon which the circuit courts are in broad agreement. See *Dicenzi* v. *Rose*, 452 F.3d 465, 470 (6th Cir. 2006) (establishing the fact-intensive nature of due diligence analysis). Accord *Wims*, 225 F.3d at 190 n.4; *Schlueter*, 384 F.3d at 74; see also *Holland* v. *Florida*, 560 U.S. 631, 653 (2010) (demonstrating that due diligence involves "reasonable" and not "maximum feasible" diligence in equitable tolling claims under Section 2244(d)) (first quoting *Lonchar* v. *Thomas*, 517 U.S. 314, 326 (1996) and then quoting *Starns* v. *Andrews*, 524 F.3d 612, 618 (5th Cir. 2008)).

The court below applied this well-trodden framework to determine that Ms. Ayers acted with due diligence. To be sure, Ms. Ayers was aware of her trial counsel's failure to call an expert to challenge Winter's qualifications and testimony. Yet Ms. Ayers lacked any facts suggesting that she had been prejudiced by the failure—and the state points to none—until she obtained Lentini's expert report, which for the first time questioned the qualifications and methodology of the state's fire investigator. See Pet. App. 11a; see also *Day*, 566 F.3d at 538 (requiring a petitioner to "set out

the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense").

Because Ms. Ayers filed her claim within one year of being able to obtain the Lentini report—the factual predicate for her ineffective-assistance claim—the decision below correctly remanded to the district court to consider her claim on the merits.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

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