No. 24-584

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

REPLY IN SUPPORT 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?

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REPLY

This case raises an important question that divides the circuits: does additional support for a claim restart the one-year habeas statute of limitations? The Sixth and Ninth Circuits stand apart in answering "yes." And although Ayers attempts to explain away the split, she cannot distinguish the relevant cases. In fact, she offers an additional case demonstrating the split.

I. The question is important.

If supporting evidence can be the "factual predicate" that restarts the habeas clock, it is hard to think of a case in which a petitioner would not be entitled to a restart. This case is the epitome. Virtually any litigant could hire a new expert to criticize the trial testimony. And every petitioner could claim that the expert's opinion is "new." That is why the "factual predicate" is meant to include only the actual facts that constitute the claim, not the supporting evidence. If the habeas time limit waited for petitioners to understand their claims and amass evidence for them, there "would be no effective time limit," and the statute of limitations "might as well not exist." *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000), as amended (Jan. 22, 2001).

Indeed, Ayers's position leads to absurdity in habeas practice. Especially for ineffective-assistance claims like Ayers's, it introduces incoherence: if an expert report can show that counsel unreasonably failed at trial, it also proves that the contents of the report were previously available (otherwise trial counsel would not be unreasonable for failing to present it at trial). But not so under Ayers's logic in which the supporting expert report is the factual predicate.

In sum, preserving AEDPA's one-year limitation is as important as preventing workaround through the saving clause, *Jones v. Hendrix*, 599 U.S. 465 (2023), barring evidentiary hearings that contravene the statute, *Shinn v. Ramirez*, 596 U.S. 366 (2022), and clarifying the standard for assessing trial prejudice, *Brown v. Davenport*, 596 U.S. 118 (2022).

II. The circuits are split on whether new support is a factual predicate.

Ayers's core attempt to downplay the circuit split is that this Court should not look past the surface of the circuits' language. She points out that several courts have used the same "vital facts" language to gloss the term "factual predicate." Resp.6, 8–9 (quotation omitted). That is true, and clear from the opinion below. What is not clear is why circuits interpret and apply the term "vital facts" so differently from each other. Each of the three categories of disagreement the petition highlighted still demonstrates the split in the circuits. Simply having quoted similar language does not put the circuits in agreement.

Expert Reports. At the very least, this case directly conflicts with the Second Circuit's *Rivas* case on virtually indistinguishable facts. Both cases involved a new expert. Pet.App.6a; *Rivas v. Fischer*, 687 F.3d 514, 528, 536 (2d Cir. 2012). Both experts attacked the trial testimony in post-trial writings. Pet.App.6a; *Rivas*, 687 F.3d at 536. And both new expert opinions were based on evidence introduced or available at trial. Pet.App.6a; *Rivas*, 687 F.3d at 536. Despite those shared facts, the courts diverged on the legal principle and came to opposite conclusions on the same question.

Ayers offers another case that supports the circuit split on "facts actually comparable to those here." Resp.14. In a case that involved multiple new claims, the Fifth Circuit rejected the one most similar to Ayers's. Petitioner offered, among other things, two new expert reports to undermine his conviction. One was a new expert affidavit that, like Ayers's, questioned trial counsel's effectiveness in failing to develop certain expert testimony to support a defense at trial. *In re Swearingen*, 556 F.3d 344, 349 n.7 (5th Cir. 2009) (per curiam); No. 09-20024, Doc.3 at 13–15, 35, 37–38 (Jan. 20, 2009). The other report, unlike Ayers's, was an affidavit from an expert who testified at trial, and it detailed how she had been misled by the data provided to her at trial. *In re Swearingen*, 556 F.3d at 348. The Fifth Circuit rejected the first because it was based on a previously-available factual predicate. *Id.* at 349 n.7. And it allowed the second only because it "rest[ed] not on the correctness of [the expert's] testimony (which could have been disputed at any time)," but rather on a fact that "could not be known before her affidavit." *Id.* at 348. In other words, the Fifth Circuit would not have permitted Ayers to restart her habeas time limit either.

As Ayers notes, the Sixth Circuit held differently on expert reports in unpublished cases. But *Ayers* is published precedent; those cases are not. Resp.18–19 (citing *Stokes v. Leonard*, 36 F. App'x 801 804–05 (6th Cir. 2022); *Boyer v. Robey*, No. 23-5655, 2024 WL 3052322, at *2 (6th Cir. Jan. 9, 2024)). So those cases cannot bring circuit precedent in line with the other circuits while *Ayers* still stands.

New Evidence. Five circuits hold that developing new evidence does not restart the habeas clock. Consider each case in turn. In *Martin v. Fayram*, the

factual predicates for an ineffective-assistance claim were the failures that happened at trial, not additional evidence supporting the claim. 849 F.3d 691, 696–97 (8th Cir. 2017). And that was true even though the petitioner claimed that evidence developed in state postconviction review, including testimony and depositions, was "critically important for the proper adjudication" of the claims. *Martin v. Fayram*, No. 15-3523, Apt. Br.20–21 (May 3, 2016). Ayers says this case is distinguishable but does not explain how the *Martin* petitioner was not in the exact same position as Ayers—needing to "plausibly allege[] facts to satisfy *both* elements of [his] ineffective-assistance claim." Resp.16. Yet despite both cases having the same legal claim and the same two elements, *Martin* came out the opposite way.

In *Flanagan v. Johnson*, the petitioner (like Ayers) knew of an error his counsel committed at trial. 154 F.3d 196, 199 (5th Cir. 1998). But his time limit did not reset after he obtained "evidence in support" of his claim. Resp.14 (quoting *Flanagan*, 154 F.3d at 199). That contrasts with the decision the court made in Ayers's case, which *did* restart the clock upon finding "facts supporting the claim's merits." Pet.App.10a. Ayers's attempt to distinguish this case overlooks that she, like the *Flanagan* petitioner, "kn[ew] … all along" that her counsel had erred (in her case, by not calling a competing expert). Resp.14.

The same goes for *McAleese*. Ayers notes that the petitioner there knew "that the parole board pretextually denied him release," meaning he knew the factual predicate even though he did not yet have evidence for it. Resp.13 (citing *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir. 2007)). So too here: Ayers knew at the time of trial that her attorney had not called a

competing expert; she just lacked some evidence she could have used to support her ineffective-assistance claim. Pet.App.5a.

That pattern repeats with *Johnson*. Ayers recognizes that the petitioner there knew that he had a co-participant in his crime but could not prove it with evidence. Resp.15. The possibility of later evidence supporting that knowledge could not restart the habeas clock. *Johnson v. McBride*, 381 F.3d 587, 588–89 (7th Cir. 2004). Ayers knew of counsel's failures during trial; and following *Johnson*'s logic, her later-discovered supporting evidence should not have restarted the time limit.

Finally, the petitioner in *Taylor* knew that a witness's testimony was false, but he was not able to prove it. *Taylor v. Martin*, 757 F.3d 1122, 1123 (10th Cir. 2014). A later affidavit supporting his claim did not restart the clock even though it "strengthened" his claim. Resp.17. Likewise, Ayers's evidence supporting her claim should not have restarted her clock.

Ayers also does not grapple with the reality that evidence is not a prerequisite for filing a claim. The circuits that stand opposite the Sixth and Ninth have explained that the habeas clock need not wait for supporting evidence or affidavits because discovery exists to unearth those materials. *McAleese,* 483 F.3d at 215.

Whether Ayers exercised due diligence is not important to the question presented. *Contra* Resp.20. Whether or not the Sixth Circuit was correct on that holding, that question is separate from (and comes after) the determination of the factual predicate. The important point is that the court identified the new expert report as factual support and yet still held that

report was the factual predicate, contrary to what most other circuits would have done in the same situation.

The Sixth Circuit case *Jefferson v. United States* would fit into the category of new evidence, but it is of little help for establishing the law. 730 F.3d 537 (6th Cir. 2013). The petitioner there filed his petition *before* he received the supposedly necessary new evidence. *Id.* at 547. The court pointed out that the new evidence could hardly be necessary for the filing, since he had already filed without it. *Id.* Few cases will involve a discrepancy so obvious between the petitioner's actions and arguments.

New Legal Understanding. Finally, two circuits have rejected the idea that a new understanding of legal significance can restart the habeas clock. *Holmes v. Spencer*, 685 F.3d 51, 59 (1st Cir. 2012); *Cole v. Warden, Georgia State Prison*, 768 F.3d 1150, 1155, 1157 (11th Cir. 2014). The Sixth Circuit's holding folds in the fact that Ayers did not understand the legal significance of the facts she knew, such as her counsel's failure to challenge the state's expert's qualifications. Pet.9a. Yet it also holds that Ayers could not have known the importance of those facts: that the State's expert was unqualified and that she therefore had an ineffective assistance claim. Pet.10a–11a. That holding contradicts the First and Eleventh Circuit cases above and demonstrates that other circuits would not permit her new understanding to revive her habeas clock.

* * *

Like the Sixth Circuit, the Ninth Circuit stands against the majority of the circuits in permitting new evidence to serve as the factual predicate and restart

the habeas clock. *Hasan v. Galaza*, 254 F.3d 1150, 1154–55 (9th Cir. 2001). Even though the petitioner knew all along that his counsel had not investigated a jury-tampering incident, the court permitted a late-breaking ineffective-assistance argument because the petitioner discovered more information about the incident later on. *Id.* at 1154.

III. This case is a good vehicle.

As the Director's petition explained, this case is an ideal vehicle for deciding the question presented. The question presented is the defining issue in the case, and no factual dispute clouds the legal dispute.

Ayers asserts that the petition wrongly assumes the new expert report was "new support" for Ayers's claim. Resp.22. She thinks that exposes the petition as assuming away a factual dispute. But the petition's characterization comes directly from the decision below: "Lentini's report … provides facts supporting the claim's merits." Pet.App.10a. So there is no fact dispute there.

Ayers also takes umbrage with the petition's question presented because it notes that the claim was "previously available." Resp.22. But that is just another way of saying that the original act giving rise to the claim was already knowable. After all, the term "previously available" is not in the statute, so the petition could not be igniting (or eliding) a controversy about how to interpret it. *See* 28 U.S.C. §2244(d)(1)(D). The core question is still whether the factual predicate is the original act giving rise to the claim or the evidence that supports the claim. Most circuits start the clock upon the original act that gives rise to the claim (or when it becomes discoverable).

The Sixth and Ninth Circuits wait until the petitioner has enough evidence to support her claims.

Ayers also argues that the Director's petition was late because it was filed on the deadline as established in this Court's rules. Resp.27. She is wrong. Because the statute, 28 U.S.C. §2101(c), does not specify a different computation method, deadlines falling on a weekend or legal holiday roll to the next workday. S. Ct. Rule 30.1; *see also* Fed. R. App. P. 26(a)(1)(C). Ayer's contrary suggestion notwithstanding, the Court's rule is consistent with the statute's 90-day language, especially in light of the fact that the congressionally approved Federal Rules of Appellate Procedure adopt the pervasive norm that courts (and their staff) do not accept filings on weekends or holidays and thus roll the deadline to the next workday. *Union Nat. Bank of Wichita, Kan. v. Lamb*, 337 U.S. 38, 41 (1949); *Caspari v. Bohlen*, 510 U.S. 383, 390–91 (1994). If *Lamb* does not answer the question, this Court still has statutory discretion to add days for "good cause." 28 U.S.C. §2101(c). The fact that the Court is closed on those days, making filing impossible, could be understood as de facto "good cause." If the Court chooses to engage this issue, it should take one of two paths: formally grant the necessary extension now for the "good cause" that the Director followed this Court's rules, or take up the question of the timeliness of the petition alongside the merits. After all, no one would purposely file on the 91st day to tee up this issue, so it will never arise in a better vehicle.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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