No. 12-126

# In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

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

## REPLY BRIEF


Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
*Counsel of Record*
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

John S. Pallas
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**Cases**

**Statutes**



**Other Authorities**

**Rules**

## INTRODUCTION

Perkins' entire theory of the case rests on the misconception that *Holland* v. *Florida*, 130 S. Ct. 2549 (2010), imported every equitable doctrine as an exception to AEDPA's statute of limitations. He argues that because the miscarriage-of-justice exception is a recognized equitable doctrine, it must apply here. But Perkins misapprehends *Holland*'s holding (which is limited to equitable tolling), the miscarriage-of-justice exception (which applies to court-created procedural bars—not federal statutes of limitation), and AEDPA itself (which occupies the field by providing a one-year filing window for all claims based on new evidence).

*Holland* turned on the fact that courts had applied equitable tolling as an exception to civil and criminal statutes of limitations for many years. The principle is so well-established that the Court *presumes* all non-jurisdictional federal statutes of limitation are subject to a rebuttable presumption in favor of equitable tolling; Congress must rebut that presumption in the statute's plain text to preclude such tolling. This Court in *Holland* concluded that nothing in AEDPA's text rebutted the presumption.

But pre-AEDPA, no court had ever grafted a miscarriage-of-justice exception onto any federal statute of limitations. Nor had any court put Congress on notice that if Congress failed to exclude the exception in the statutory text, courts would assume the exception applies. Thus, courts cannot presume Congress intended to incorporate the exception as a way to abrogate AEDPA's limitations period. A litigant must show Congress expressly *included* the exception.

Congress did incorporate the miscarriage-of-justice exception in two places in AEDPA. But Congress conspicuously declined to do so in § 2244. Instead, Congress reasonably created a one-year filing window following discovery of new evidence, whether or not the petitioner claims innocence. Thus, to apply the exception here, beyond that one year, would exceed the scope of the congressionally delegated habeas corpus power. *Ex parte Bollman*, 4 Cranch 75, 94 (1807) ("[T]he power to award the writ by any of the courts of the United States, must be given by written law."); *Dodd* v. *United States*, 545 U.S. 353, 359 (2005) ("Although we recognize the potential for harsh results in some [habeas] cases, we are not free to rewrite the statute that Congress has enacted.").

Perkins also misapprehends Michigan's theory of the case. Michigan does not believe that AEDPA deprives an actually innocent defendant of an opportunity to advance a claim based on new evidence. A defendant who uncovers new evidence 50 years after state proceedings become final is entitled to file a habeas claim under § 2244(d)(1)(D) based on that new evidence. But AEDPA *does* require the defendant to come forward with that evidence within one year after discovery. A diligence requirement is consistent with equity, the states' interest in responding to claims based on new evidence while it is fresh, and Perkins' interest in having his claim adjudicated promptly.

The idea of keeping the filing window open indefinitely for those claiming innocence sounds virtuous. But doing so defeats the balance Congress created and invites abuses that will overwhelm and mask the few meritorious petitions in the system.

## REPLY ARGUMENT

### I. The Court should not write into AEDPA a miscarriage-of-justice exception that Congress rejected.

#### A. Congress controls the scope of the habeas writ.

This Court has unanimously "recognized that 'the power to award the [habeas] writ by any of the courts of the United States[ ] must be given by written law.'" *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) (quoting *Bollman*, 4 Cranch at 94). So while federal courts can clarify ambiguities in the habeas corpus statute, *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993), "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, 518 U.S. at 651 (quoting *Lonchar* v. *Thomas*, 517 U.S. 314, 323 (1996)).

"[T]he fact that the writ has been called an 'equitable' remedy [see Resp. Br. 17] does not authorize a court to ignore this body of [habeas] statutes, rules, and precedents." *Lonchar*, 517 U.S. at 323. "There is no such thing in the Law[ ] as Writs of Grace and Favour issuing from the Judges." *Id.* (quoting *Opinion on the Writ of Habeas Corpus*, Wilm. 77, 87, 97 Eng. Rep. 29, 36 (1758) (Wilmot, J.)).

As a result, subject to judicial power to clarify ambiguities, AEDPA specifies the limits of federal-court authority to grant habeas relief. "It is for Congress, not this Court, to amend the statute if it believes that [AEDPA] unduly restricts federal prisoners' ability" to file. *Dodd*, 545 U.S. at 359–60.

### B. Section 2244(d)(1)(D)'s plain text excludes a miscarriage-of-justice exception to the one-year limitations period.

Section 2244(d) includes six paragraphs that define in great detail AEDPA's one-year limitations period for "a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). Congress considered the situation at issue here, where a state-court defendant belatedly discovers new evidence; determined that a constitutional claim based on such evidence should be heard if filed promptly; and specifically created a one-year window within which to file that claim, regardless of whether the defendant asserts innocence. § 2244(d)(1)(D).

Nowhere in § 2244(d) does Congress suggest the existence of an additional exception based on the miscarriage-of-justice doctrine. As this Court has affirmed in a variety of contexts, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (quotation omitted). And that observation carries even greater weight given that § 2244(d)(1)(D) addresses the exact situation presented here and opens a one-year filing window available to those claiming unfair trials, whether or not they assert innocence.

Tellingly, Congress did expressly incorporate the miscarriage-of-justice exception in other AEDPA sections. Just two subsections above § 2244(d), in a provision barring successive habeas petitions, Congress created an "innocence" exception based on new evidence for petitioners who acted diligently. 28 U.S.C. § 2244(b)(2)(B)(i)–(ii).

Several sections later, Congress did it again. In a provision barring federal-court evidentiary hearings, AEDPA created an "innocence" exception based on new evidence for petitioners who acted diligently. 28 U.S.C. § 2254(e)(2)(A), (B).[1]

In other words, Congress knows how to incorporate a miscarriage-of-justice exception to overcome AEDPA procedural bars when it wants to do so. But Congress intentionally omitted the exception when it catalogued the various other exceptions to AEDPA's one-year limitations period. The plain statutory text is conclusive proof that Congress did not intend the miscarriage-of-justice exception to apply to § 2244(d)(1) generally, or to the new-evidence exception in particular. *David* v. *Hall*, 318 F.3d 343, 346 (1st Cir. 2003) ("Congress likely did not conceive that the courts would add new exceptions."); *Flanders* v. *Graves*, 299 F.3d 974, 977 (8th Cir. 2002) (it is not the judicial branch's role to "engraft an additional judge-made exception onto congressional language that is clear on its face"); *Escamilla* v. *Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005) ("courts cannot alter the rules laid down in the text"); *Cousin* v. *Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) (noting that the "one-year limitations period established by § 2244(d) contains no explicit exemption for petitions claiming actual innocence" and declining to create one).

---

[1] Because these two sections enhance the miscarriage-of-justice exception with a diligence requirement, Perkins reads them as evidence that Congress knew how to amend the exception, and that Congressional silence in § 2244(d) means that Congress intended to incorporate the exception without limitation. Resp. Br. 31. As explained below, that analysis has it exactly backward.

### C. *Holland* properly applied the presumption that *every* federal statute of limitations incorporates equitable tolling.

*Holland* recognized that Congress drafts against background principles. One of those principles is a presumption that Congress intends every statute of limitations to include equitable tolling unless the statutory text expressly excludes it. The same is not true for the miscarriage-of-justice exception.

This Court has long recognized the availability of equitable tolling to extend a federal statute of limitation. E.g., *Sebelius* v. *Auburn Regional Med. Ctr.*, __ S. Ct. __, 2013 WL 215485, at *10 (Jan. 22, 2013) (citing the Court's case law dating back to the 1800s). The doctrine has become so well-established that since at least 1990—six years before Congress enacted AEDPA—this Court recognized that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor of 'equitable tolling.'" *Holland*, 130 S. Ct. at 2560 (citing *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990)).

The reason underlying this presumption is that "[s]uch a principle is likely to be a realistic assessment of legislative intent." *Sebelius*, 2013 WL 215485, at *10 (quoting *Irwin*, 498 U.S. at 95). In other words, when Congress enacts a new statute of limitations, it does not write on a blank slate; this Court assumes that Congress intended the statute to preserve the equitable-tolling doctrine unless the statutory text shows a contrary intent.

It was against the backdrop of this historical equitable-tolling tapestry that Congress adopted AEDPA in 1996. Thus, when asked to decide whether AEDPA's general one-year limitations period included equitable tolling, this Court in *Holland* began with the "hornbook law that limitations periods are customarily subject to equitable tolling." 130 S. Ct. at 2560 (internal quotation marks omitted). The Court concluded that AEDPA's language regarding the general one-year limitations period for filing a habeas petition did not rebut the *Irwin* presumption. By failing to affirmatively exclude the equitable-tolling doctrine, Congress intended to incorporate equitable tolling.

### D. There is no presumption that *any* federal statute includes the miscarriage-of-justice exception.

In *Holland*, this Court applied the *Irwin* presumption, which dictates how federal statutes are construed. The assumption Perkins wants the Court to apply here is very different because the miscarriage-of-justice exception never had been applied to infer new terms into any federal statute. (Perkins says this Court has "also applied [the exception] to limits created by Congress." Resp. Br. 17. But he cites no authority for that proposition.)

This is true for a simple reason: such an exception only makes sense in the context of a collateral attack on a state-court conviction, and until Congress adopted AEDPA in 1996, there was no habeas limitations period. While the exception was sometimes used to excuse untimely state filings, there has never been a judicial presumption that the exception applies absent

explicit statutory language to the contrary. In other words, Congress *was* writing on a clean slate with AEDPA's statute of limitations and the miscarriage-of-justice exception, with historical backdrop providing only the principles of timely filing and diligence. Pet. Br. 19–21, 26–27.

So this case is the reverse of *Holland*. It is not enough for Perkins to show that Congress did not *exclude* the miscarriage-of-justice exception; it is Perkins' burden to demonstrate that Congress affirmatively *included* the exception when drafting § 2244(d)(1)(D). But as explained above, AEDPA's text demonstrates the exact opposite.[2]

Perkins' analysis of AEDPA's successive-petition and evidentiary-hearing provisions illustrates his error. As noted, both provisions expressly adopt the miscarriage-of-justice exception with an added diligence requirement. Thus, Perkins argues:

> These provisions demonstrate Congress's detailed attention to, and ability to amend, the miscarriage of justice exception through AEDPA. It also reveals Congress's intent to leave the exception in place for untimely

[2] In *Holland*, this Court held that equitable tolling's rebuttable presumption outweighed the fact that Congress specified statutory tolling in § 2244(d)(2) but omitted equitable tolling in § 2244(d)(1). Such specification was necessary given the differences between state and federal post-conviction procedures. *Holland*, 130 S. Ct. at 2561–62. But here, Michigan is relying on much more than just the miscarriage-of-justice exception's omission; § 2244(d)(1) occupies the field by opening a one-year window to file a claim based on new evidence regardless of any assertion of innocence.

> petitions. . . . [H]ad Congress sought to *prohibit* courts from incorporating the exception into AEDPA's limitations period, it would have done so expressly, as it did elsewhere. [Resp. Br. 31–32 (emphasis added).]

But that's the point: Congress in § 2244(d)(1)(D) did expressly account for the circumstance Perkins presents—new evidence that gives rise to a constitutional claim—and specifically adopted a procedure for it. Courts have no authority to read in a limitation that defeats the scheme Congress created.

Even if examined as legislative silence (i.e., absent the presumption that was present in *Holland* for equitable tolling), the fact that "Congress was silent" on the miscarriage-of- justice exception's application to § 2244(d)(1)(D), Resp. Br. 31, means the exception is excluded. *Flanders*, 299 F.3d at 977 ("The statute fixes a one-year period of limitations, and says nothing about actual innocence, even though other parts of AEDPA, enacted at the same time, do refer to this doctrine. It is not our place to engraft an additional judge-made exception onto congressional language that is clear on its face.") (citation omitted). It is one thing for this Court to apply a presumption when this Court has forewarned Congress that it will do so. It is another matter entirely to write new language into a statute where Congress had no warning.

Perkins' argument is that Congress enacted AEDPA against the background of the miscarriage-of-justice exception, and AEDPA lacks a "clear command" overriding the exception. Resp. Br. 2, 29. In his view, the exception is just like equitable tolling and should likewise be presumed included unless a statute

affirmatively excludes it. But it makes no sense for Congress to address new evidence that gives rise to new constitutional claims and then anticipate that the Court would nonetheless apply a new miscarriage-of-justice presumption. Even if Congress's language is somehow construed as silence regarding the miscarriage-of-justice exception, it is Perkins' burden to identify the exception in § 2244(d)(1)(D)'s plain text.

And make no mistake—a judicially rewritten statute is precisely what Perkins seeks. Whereas § 2244(d)(1)(D) says that a habeas petitioner may file a claim within one year following the discovery of new evidence supporting the claim, Perkins asserts that a petitioner may file indefinitely. There is no basis for such a judicial amendment without first putting Congress on notice that the lack of affirmative *exclusion* will be interpreted as intentional *inclusion*.

In sum, § 2244(d)(1)(D) occupies the field for the miscarriage-of-justice exception by providing one year to file all habeas claims based on new evidence, whether or not the defendant asserts innocence. And no pre-AEDPA case created a presumption that required Congress to exclude the exception. It therefore violates AEDPA's mandate and the separation of powers to rewrite the statute to include the exception. And it is illogical to think that Congress required petitioners to pursue new evidence diligently, 28 U.S.C. § 2244(d)(1)(D), but intended to allow an indefinite time within which to file a habeas petition based on that evidence. "Prisoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action." *Escamilla*, 426 F.3d at 872.

### E. Numerous policy reasons underlie Congress's decision not to incorporate a miscarriage-of-justice exception into the habeas statute of limitations.

Congress's decision to exclude a miscarriage-of-justice exception in AEDPA's statute of limitations makes sense for a number of reasons.

To begin, AEDPA has a limitations period because delay undermines a state's interest in responding while evidence is still fresh. That competing state interest demands prompt pursuit of a claims. Equitable tolling recognizes that sometimes events conspire to prevent a petitioner from prompt pursuit. *David*, 318 F.3d at 347 ("A defendant who could not have filed his petition earlier is at least a sympathetic figure; one who has a known claim, defers presenting it, and then asks to be excused for the delay is unlikely to get cut much slack.").

In contrast, the purpose of the miscarriage-of-justice exception is to relieve a litigant not from congressional limits but from court-created procedural bars. The cases Perkins cites (at 21–25) illustrate this. See *Kuhlmann* v. *Wilson*, 477 U.S. 436, 449–52 (1986) (court-created bar against successive petitions); *McCleskey* v. *Zant*, 499 U.S. 467, 494–95 (1991) (court-created bar against abusive petitions); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (court-created bar based on failure to develop facts in state court); *House* v. *Bell*, 547 U.S. 518, 522 (2006) (court-created bar of procedural default); *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991) (same); *United States* v. *Addonizio*, 442

U.S. 178, 185 (1979) (court-created bar for non-constitutional errors asserted in habeas).[3]

And in the paradigmatic equitable-tolling case, a habeas petitioner timely presented all of his claims to a state court, and those claims already have been resolved. The problem is that something beyond the petitioner's control prevented him from timely filing his habeas claim, and he is required to file promptly when that barrier has been lifted. So equitable tolling is true tolling.

In contrast, Perkins seeks nothing less than equitable abrogation. Because his equitable theory has no relationship to any extraneous person or thing preventing a filing, Perkins' theory allows habeas petitions to be filed in perpetuity. Such an infinite timeline for action is the antithesis of AEDPA.

Perkins' argument also renders § 2244(d)(1)(D) superfluous insofar as Congress sought to address the issue of new evidence that is both probative of innocence *and* relevant to a constitutional claim. While it is theoretically possible to separate these two purposes, Resp. Br. 43–44, the statute requires the new evidence to be wedded to a claim of a constitutional violation. Otherwise, the newly discovered evidence would have no significance to whether the petitioner was entitled to relief. See *Herrera* v. *Collins*, 506 U.S. 390, 400

---

[3] Perkins also cites a statement concerning the denial of certiorari as proof this Court has used the miscarriage-of-justice doctrine to avoid the limits of former Habeas Rule 9(a), which operated like a "laches" doctrine. Resp. Br. 24. Again, this is a court-created procedural bar, not a congressionally imposed limit on the judiciary's habeas authority.

(1993) (no standalone actual-innocence claim with possible death penalty exception). Perkins' effort to sever § 2244(d)(1)(D)'s intertwined purposes ignores this reality and substantially reduces the provision's significance.

Finally, as this Court explained in *Holland*, equitable tolling necessarily involves a delay that is not the petitioner's fault. 130 S. Ct. at 2562. *Holland*'s inclusion of a diligence requirement underscores this point. *Id.* But application of the miscarriage-of-justice exception to AEDPA's statute of limitations relieves the habeas petitioner of his own negligence. There is no unfairness in denying relief to a non-diligent litigant, particularly when delay prejudices the state.

It is no coincidence that whenever this Court has applied the miscarriage-of-justice exception to excuse a court-created procedural bar, it has done so in the context of a claim filed within AEDPA's one-year statute of limitations. Pet. Br. 30. In such circumstances, the habeas petitioner has, by definition, pursued his federal claim promptly. Perkins proposes a world where there is no requirement to proceed promptly with a federal habeas claim. The Court should reject that world as unworkable and in conflict with AEDPA's purpose. H.R. Rep. No. 104-518, at 111 (1996) ("This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus."). More important, the Court should reject that world as inconsistent with AEDPA's plain text. It is not this Court's role to determine how Congress *should have* drafted the statute, as Perkins urges; the Court need simply apply the statute Congress actually enacted.

### F. If the miscarriage-of-justice exception applies to habeas claims based on new evidence, the exception will also abrogate AEDPA's general one-year limitations period.

This case involves a § 2244(d)(1)(D) claim based on new evidence, but Perkins' logic applies equally to AEDPA's more general one-year limitations period in § 2244(d)(1). If Perkins prevails, any petitioner who misses the one-year filing window need simply recite "I'm actually innocent" when asserting his constitutional claim to avoid a statute-of-limitations dismissal under Habeas Rule 4.

The only possible distinction from the general one-year limitations period is that § 2244(d)(1)(D) petitioners pair their constitutional claim with new evidence. Resp. Br. 1. But if the equitable driving force is concern for the "innocent" petitioner, it makes no difference whether the petitioner has new evidence or claims constitutional error based on evidence previously presented. And unlike equitable tolling, application of the miscarriage-of-justice exception to AEDPA's general one-year limitations period would negate the provision. Equitable tolling takes the smallest possible bite out of § 2244's one-year requirement, excluding litigants only when an extraordinary circumstance "prevented timely filing" and the petitioner acted diligently. *Holland*, 130 S. Ct. at 2562. The miscarriage-of-justice exception contains neither restriction. So the exception's future application to § 2244(d)(1)'s general one-year limitations period—the natural result if this Court affirms the Sixth Circuit—will result in a flood of time-barred petitions that will overwhelm the courts' ability to identify the few

meritorious petitions in the system. *Herrera*, 506 U.S. at 426 (O'Connor and Kennedy, J.J., concurring) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.").

Perkins' petition is a paradigmatic example of the type of petition abuses the courts will see if the Sixth Circuit's rule is upheld. Assuming the truth of all three affidavits Perkins has produced, he has at best established that Jones stabbed Henderson and had blood on his clothes. Those facts are entirely consistent with the theory the prosecutor presented to the jury: that Perkins and Jones murdered Henderson behind Dukette School *together*. Pet. Br. 10 (citing J.A. 113–14). And this new evidence does not contradict that Perkins (1) repeatedly told his friend Chauncy Vaughn he was going to kill Henderson, Pet. Br. 7 (citing J.A. 25), (2) confessed to Vaughn in detail after the murder had been committed, Pet. Br. 9 (citing J.A. 37–38), (3) told Torriano Player where to find Henderson's body, Pet. Br. 9 (citing J.A. 73), and (4) turned himself in to police, Pet. Br. 9 (citing J.A. 76).

To preserve the habeas process for those with legitimate claims of error, the courts should not process petitions like Perkins'. The courts should summarily dismiss time-barred petitions.

### G. The new-evidence exception was designed for cold-case investigatory work and discoveries.

The law enforcement *amici curiae* note that it can take a long time to conduct cold-case investigatory work. But by focusing on the time needed to *discover* new evidence, the *amici* address the wrong question. Section 2244(d)(1)(D) places no time limit on when new evidence must be discovered—just that it be sought with diligence. Nor does Michigan urge otherwise.

The issue here is the one-year time limit § 2244(d)(1)(D) imposes *after* the factual predicate of a habeas claim has (or should have been) discovered. In short, § 2244(d)(1)(D) does not bar evidence that took 20 years to discover with diligence, provided that the petitioner brings his habeas claim within one year once the factual predicate *is* discovered. And while the *amici* believe that Congress's imposition of a diligence requirement is unwise, this Court does "not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders." *National Fed'n of Independent Business* v. *Sebelius*, 132 S. Ct. 2566, 2579 (2012).

In their brief, the *amici* discuss four "innocence cases" they believe indicate the importance of the "passage of time" in the process of discovering that a prisoner may be actually innocent. They add that "serendipity" plays an important role in discovering evidence that a person convicted of a crime is in fact innocent. And they assert that advances in science and technology often result in exonerating evidence being discovered many years after a conviction, which

requires further testing and investigation for corroboration and reliability. The *amici*'s reliance on these examples highlights *amici*'s misconception of the issue presented.

For example, the *amici* note that in the case of Larry Pat Souter, it took eight years "before sufficient evidence of innocence could be amassed to build a case strong enough to result in Souter's release from prison." (Law Enforcement *Amici* Br. 19.) But that point goes to when "the factual predicate of the claim" could be discovered in due diligence, not to the issue here: whether the petitioner must file his claim within one year after that factual predicate has been discovered.

The same is true of the new evidence concerning the "Central Park Five," who were convicted in 1990 and released when another man confessed to the murder in 2002. (*Id.* at 26–27.) The *amici* provide no reason why the five defendants—if they had not been freed by New York—could not file habeas petitions asserting a constitutional claim based on the confession within a year of it. 28 U.S.C. § 2244(d)(1)(D).

If an incarcerated defendant gets a new lead, pursues it vigorously, and is impeded by third parties or other circumstances beyond his control, he will have met § 2244(d)(1)(D)'s due diligence requirement so long as his efforts reflect forward momentum rather than inaction. And to the extent that state officials create impediments, AEDPA takes that into account in 28 U.S.C. § 2244(d)(1)(B).

Michigan agrees with *amici* that advances in forensic science do not occur overnight. But once they do occur, and a defendant uncovers the factual predicate for a new habeas claim, it is reasonable to require the defendant to act within one year. Section § 2244(d)(1)(D) requires nothing more.

## II. At a minimum, a habeas petitioner seeking to avoid AEDPA's one-year limitation period for filing a claim based on new evidence must act with diligence.

This Court has long recognized that a litigant invoking equity must act diligently. E.g., *Pace* v. *DiGuglielmo*, 544 U.S. 408, 419 (2005) ("Under long-established principles, petitioner's lack of diligence precludes equity's operation."); *Irwin*, 498 U.S. at 96 (courts "have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights"); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984) (one "who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence"); *McQuiddy* v. *Ware*, 20 Wall. 14, 19 (1873) ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights.").

*Pace*, for example, involved a habeas petitioner who sought to invoke equitable tolling to excuse an untimely habeas petition under AEDPA. (*Pace* pre-dated *Holland* and assumed, without deciding, that equitable tolling was available to suspend AEDPA's general one-year limitations period. *Pace*, 544 U.S. at 418 n.8.) This Court's analysis of Pace's failure to pursue his claims diligently in state court applies

equally to Perkins' failure to pursue his claims based on purported new evidence:

> Petitioner's [state] petition set forth three claims. . . . The first two of these claims were available to petitioner as early as 1986. . . . The third claim . . . related only to events occurring in or before 1991.
>
> Yet petitioner waited years, without any valid justification, to assert these claims in his November 27, 1996 [state] petition. Had petitioner advanced his claims within a reasonable time of their availability, he would not now be facing any time problem, state or federal. . . . Under long-established principles, petitioner's lack of diligence precludes equity's operation. [544 U.S. at 418–19.]

Thus, if AEDPA's limitations period is going to be abrogated, the Court should, at the very minimum, contain a diligence requirement:

> We do not hold that actual innocence can never be relevant to a claim that the habeas statute of limitations should be equitably tolled. For such a claim to be viable, though, a petitioner would have to show some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations. [*Flanders*, 299 F.3d at 978.]

Such an approach, while deviating from § 2244(d)(1)(D)'s text, at least respects the intent to require diligence that Congress expressed in other provisions. 28 U.S.C. § 2244(b)(2)(B)(i)–(ii) (successive petitions); 28 U.S.C. § 2254(e)(2)(A), (B) (evidentiary hearings). The approach also honors the states' competing interest in the timely presentation of claims with new evidence, and it is consistent with some circuit courts' approach of adding a diligence component to the presentation of new evidence of innocence under the *Schlup* inquiry. E.g., *Amrine* v. *Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (en banc) ("evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence").

Finally, if there is going to be an equitable abrogation of § 2244(d)(1)(D), it should at least take into consideration the fact that Congress wrote a "diligence" requirement into the provision. 28 U.S.C. § 2244(d)(1)(D) (one-year window runs from the "date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of *due diligence*") (emphasis added). It makes little sense to say that a habeas petitioner must diligently pursue new evidence under § 2244(d)(1)(D), but that once he has that evidence in hand, he has an indefinite time within which to file a habeas petition.

A diligence requirement is fatal to Perkins' habeas petition. He did not pursue his federal habeas petition with even a modicum of diligence. Indeed, he did not claim otherwise below, and there is no credible basis to reach the contrary conclusion. Pet. App. 31a. Accordingly, the court of appeals should be reversed.

**III. Perkins' other arguments lack merit.**

Once this Court's decision in *Holland* and the differences between equitable tolling and the miscarriage-of-justice exception are clearly understood, Perkins' remaining arguments can be disposed in summary fashion.

*First*, Perkins claims that this Court has treated violations of AEDPA's statute of limitations the same as other "threshold constraints" on habeas applicants. Resp. Br. 34–36 (citing *Day* v. *McDonough*, 547 U.S. 198 (2006)). But *Day* involved district courts' power to *sua sponte* use a procedural bar to *prohibit* a habeas claim filed three weeks late, even where the state had not raised the issue. That decision was based on "values beyond the concerns of the parties," *Day*, 547 U.S. at 205, that AEDPA was designed to promote: conservation of judicial resources, comity, and finality. Those very concerns would be undermined if the Court affirmed the Sixth Circuit here.

*Second*, Perkins says that "general principles prove that AEDPA's limitations period incorporates the miscarriage of justice exception." Resp. Br. 30. Perkins again has it backward. This Court has repeatedly said that there is *no* constitutional right to collateral review. E.g., *Ryan* v. *Gonzales*, 133 S. Ct. 696, 704 (2013). And the focus of the habeas writ has always been the fairness of the proceedings against the habeas applicant in state court, not guilt or innocence. *Herrera*, 506 U.S. at 416. For those state prisoners that claim innocence based on new evidence, the "fail safe" is executive clemency. *Id.* at 415; accord *id.* at 427 (O'Connor and Kennedy, J.J., concurring) ("If the

Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, [the issue of a free-standing actual-innocence claim] may never require resolution at all."). The determination of whether a habeas applicant has suffered from a miscarriage of justice should primarily occur on the stage set by the state courts.

*Third*, Perkins asserts that this Court's adoption of the miscarriage-of-justice exception in the AEDPA statute of limitations context would *promote* federalism and comity by demonstrating that habeas courts give greater or equal respect to state procedural rules than their own. Resp. Br. 40. Not so. Federal courts conducting habeas review are supposed to "ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings." *Martinez* v. *Ryan*, 132 S. Ct. 1309, 1316 (2012). Unlike equitable tolling, indefinite tolling destroys finality and shows a lack of respect for state proceedings.

*Fourth*, Perkins suggests that denying him relief would be "constitutionally problematic," Resp. Br. 41, presumably referencing the Suspension Clause. But this Court has already upheld AEDPA's added restrictions on second or successive habeas petitions, *Felker*, 518 U.S. at 664, and there is nothing unconstitutional about requiring habeas petitioners to file within one year after their state convictions become final, *Delaney* v. *Matesanz*, 264 F.3d 7, 11–12 (1st Cir. 2001); *Turner* v. *Johnson*, 177 F.3d 390, 392 (5th Cir. 1999).

*Fifth*, Perkins downplays potential gamesmanship associated with equitable abrogation, arguing that if a

witness dies or becomes unavailable, a state can just rely on the witness's prior testimony, and the court in any event can hold any unjustified delay against the petitioner. Resp. Br. 44–48. But new evidence will not always implicate the same witnesses who testified at trial; none of Perkins' affiants did so here. And habeas relief can also result from constitutional deficiencies in non-trial contexts, such as the plea-taking process.

Relatedly, Perkins says that the passage of time is a "double-edged sword" because his own witnesses may become ill, die, or lose the fortitude to testify. Resp. Br. 46. But Perkins' witnesses have already preserved their testimony by affidavit. And if one of those witnesses becomes unavailable, the state will not have the opportunity to question the witness. The passage of time is not a double-edged sword. Rather, it is a sword that is far more deadly to the state than to the habeas applicant wielding it.

*Sixth*, Perkins argues that barring consideration of late-filed claims of actual innocence will encourage habeas petitioners to file actions for federal habeas relief within a year of the discovery of each new piece of evidence, even if investigations are incomplete and claims concerning the evidence not ripe. Resp. Br. 39. This case does not even present that issue, because Perkins did not file his petition until nearly six years after procuring the final affidavit.

*Finally*, Perkins mistakenly characterizes Michigan Court Rule 6.502(G)(2) as a mechanism to raise only a free-standing actual-innocence claim in state court, rather than a tool to use new evidence as a gateway to a connected constitutional claim. Resp. Br. 55. There is no such limiting language in the rule.

Perkins also denigrates Michigan's court system and the executive clemency process as inadequate. *Id.* at 55–56 (saying it is "cold comfort" to be able to return to the state courts). Such an attack does great damage to long-standing principles of federalism, comity, and finality. As this Court has recognized:

> Finality has special importance in the context of a federal attack on a state conviction. Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.
>
> Habeas review extracts further costs. Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes. Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh. [*McCleskey*, 499 U.S. at 491–92 (Kennedy, J.) (citations omitted).]

All of these interests are implicated by Perkins' time-barred claim here, and a failure to limit *Holland* to equitable tolling risks gutting AEDPA with equitable exceptions. The Court should enforce Congress's clear command in AEDPA and reverse the court of appeals.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
*Counsel of Record*
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

John S. Pallas
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

Dated: FEBRUARY 2013