No. _____

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) contains a one-year statute of limitations for filing a habeas petition. In *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010), this Court affirmed that a habeas petitioner is entitled to equitable tolling of that one-year period "only if he shows: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." This petition presents two recurring questions of jurisprudential significance involving equitable tolling under AEDPA that have divided the circuits:

1. Whether there is an actual-innocence exception to the requirement that a petitioner show an extraordinary circumstance that "prevented timely filing" of a habeas petition.

2. If so, whether there is an additional actual-innocence exception to the requirement that a petitioner demonstrate that "he has been pursuing his rights diligently."

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. The Petitioner is Greg McQuiggin, Warden of a Michigan correctional facility. The Respondent is Floyd Perkins, an inmate.

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The opinion of the Sixth Circuit Court of Appeals, App. 1a–23a, is reported at 670 F.3d 665. The opinion of the District Court, App. 25a–33a, is not reported but is available at 2009 WL 1788377. The opinion of the Michigan Court of Appeals, App. 42a–46a, is not reported.

JURISDICTION

The Sixth Circuit Court of Appeals' judgment was entered on March 1, 2012, App. 24a. A petition for rehearing was denied on April 26, 2012, App. 47a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214 (codified at 28 U.S.C. § 2241 *et seq*.), provides in relevant part:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

INTRODUCTION

A habeas petitioner who files his petition beyond AEDPA's one-year limitations period is entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland* v. *Florida*, 130 S. Ct. 2549, 2562 (2010). *Holland* recognized that attorney negligence can, in some instances, excuse an untimely filing if the petitioner has pursued his rights diligently. This petition asks whether there is an actual-innocence exception to both the prevented-timely-filing and diligent-pursuit requirements.

Respondent Perkins, a convicted murderer, filed his habeas petition on the basis of "new evidence" allegedly proving his innocence. The evidence consisted of three affidavits that purportedly corroborate the defense theory the jury rejected. Perkins filed his petition not one but six years after obtaining the last affidavit. Nonetheless, the Sixth Circuit allowed Perkins to proceed based on equitable tolling.

The first question is whether an actual-innocence claim is a proper basis for equitably tolling AEDPA's one-year limitations period absent an extraordinary circumstance that "prevented timely filing." The Sixth Circuit answered this question yes, following decisions of the Ninth, Tenth, and Eleventh Circuits. App. 8a–13a. That holding renders AEDPA's "new evidence" provision a nullity, see 28 U.S.C. § 2244(d)(1)(D) (allowing a habeas petition up to one year following the discovery of new evidence), and it deepens a conflict with the First, Fifth, and Seventh Circuits.

The second question is whether a habeas petitioner asserting actual innocence must show that he exercised diligence as a prerequisite to equitable tolling. The Sixth Circuit said no, following decisions of the Ninth, Tenth, and Eleventh Circuits, App. 19a–20a. That holding contravenes AEDPA's plain language for habeas claims based on new evidence (§ 2244(d)(1)(D) restarts the one year period from the date new evidence "could have been discovered through the exercise of due diligence"), conflicts directly with decisions of the Seventh and Eighth Circuits, and conflicts indirectly with a Third Circuit decision. The Sixth Circuit's conclusion also conflicts with this Court's statement in *Holland* that a habeas petitioner invoking equitable tolling must show "that he has been pursuing his rights diligently." 130 S. Ct. at 2562.

Because only this Court can resolve the mature circuit conflicts with respect to both of these recurring issues, the petition for certiorari should be granted and the Sixth Circuit's habeas ruling reversed.

STATEMENT OF THE CASE

A. AEDPA's one-year limitations period

Section 2244(d)(1) creates a one-year limitations period for filing a habeas petition. That year begins to run from the latest of (A) the date the conviction became final; (B) the date a state-created filing impediment was removed; (C) the date this Court created a new constitutional right deemed retroactive on collateral review; or (D) "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1).

Section 2244(d)(1)(D)'s discovery rule allows for claims of innocence where new evidence, such as DNA, does not materialize for many years (even decades) after conviction. But by requiring petitioners to bring such claims within one year after the discovery, § 2244(d)(1)(D) promotes the public's interest in the prompt assertion of habeas claims, the state's interest in litigating issues while they are still fresh, and the convicted defendant's interest in securing release if warranted by the newly discovered evidence.

B. The murder conviction

A Genesee County jury convicted Respondent Perkins of murder for brutally stabbing Rodney Henderson to death while walking down a wooded trail in Flint, Michigan. In finding Perkins guilty, the jury accepted the testimony of Damarr Jones, an eye witness to the murder. The jury rejected Perkins' claim that Jones was lying and was himself the murderer.[1]

The Michigan trial court sentenced Perkins to life in prison. The Michigan Court of Appeals affirmed, App. 42a–46a, and the Michigan Supreme Court denied leave to appeal on January 31, 1997, App. 41a.

C. Perkins' untimely habeas petition

Absent the discovery of new evidence, AEDPA required Perkins to file his petition for habeas corpus no later than May 5, 1998. 28 U.S.C. § 2244(d)(1)(A).

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[1] The Sixth Circuit panel said that what happened "is in dispute." App. 3a. The panel's statement ignores that the jury found Perkins guilty beyond a reasonable doubt.

He did not. Instead, Perkins waited more than 10 years to file, until June 13, 2008.

To circumvent § 2244(d)(1)'s one-year limitations period, Perkins claimed actual innocence based on three affidavits, one each from his sister, a friend's younger brother, and a dry-cleaning clerk. App. 4a. None of the affidavits relied on newly-discovered DNA or comparable evidence. Instead, the affidavits purported to corroborate the same defense ("Jones did it") that the jury rejected. And Perkins admits that he knew about his sister's statement at the time of trial.

The three affidavits were signed on January 30, 1997, March 16, 1999, and July 16, 2002. App. 4a. Thus, even under a "new evidence" theory, the AEDPA one-year limitations period expired on July 16, 2003. App. 4a. But Perkins did not file the instant petition until 2008, almost five years later. App. 4a.

D. District Court proceedings

The District Court denied Perkins' petition because the affidavits failed to satisfy the strict standard for proving actual innocence: new, reliable evidence that demonstrates factual innocence, not mere legal insufficiency. App. 30a (citing *Schlup* v. *Delo*, 513 U.S. 298, 324 (1995)).

Alternatively, the District Court said that the Sixth Circuit's decision in *Souter* v. *Jones*, 395 F.3d 577 (6th Cir. 2005)—which allowed equitable tolling of § 2244's one-year limitations period—does not mean that an actual-innocence claim tolls the limitations period indefinitely. App. 31a. "[T]he Supreme Court has clearly indicated that equitable tolling, regardless

of its basis, always requires the petitioner to demonstrate that he has acted diligently to pursue his rights." App. 31a (citing *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). Accord *Holland*, 130 S. Ct. at 2562 (equitable tolling requires petitioner's diligent pursuit).

E. Sixth Circuit ruling

The Sixth Circuit reversed. Relying on its previous decision in *Souter*, the Sixth Circuit first held that Perkins' "gateway actual innocence claim" allowed him to present his habeas petition "as if he had not filed it late." App. 8a. The Sixth Circuit said that nothing in this Court's *Holland* analysis calls *Souter* into question. App. 9a–11a. That is because *Holland* "does not indicate that a credible claim of actual innocence is not . . . an 'appropriate' case" for tolling. App. 11a. The Sixth Circuit so held even though *Holland* specifically tied equitable tolling to an extraordinary circumstance that "*prevented timely filing*," a prerequisite that does not exist when a habeas petitioner simply asserts actual innocence but no reason for filing many years after discovering the purported new evidence. The Sixth Circuit was satisfied that the "majority of circuits that have considered the actual-innocence gateway post-*Holland* agree" with *Souter*. App. 12a.

Next, the Sixth Circuit, again relying on *Souter*, held that Perkins need not even prove reasonable diligence to invoke equitable tolling. App. 16a. The Sixth Circuit acknowledged that this Court's language in *Holland* regarding diligence "is seemingly at odds" with *Souter*. App. 14a. But the court distinguished *Holland* and *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005), because neither case involved an actual-

innocence claim. App. 16a. "In fact, the Supreme Court has never required reasonable diligence to be shown when seeking equitable tolling due to actual innocence," said the court. App. 16a.

Finally, the Sixth Circuit declared that whether Perkins "is actually innocent is not for us to decide." App. 20a. The court rejected the District Court's cursory treatment of this issue "so that the district court may *fully* consider whether Perkins asserts a credible claim of actual innocence." App. 21a (emphasis added).

REASONS FOR GRANTING THE PETITION

I. The petition should be granted to resolve a deep and mature circuit conflict regarding the availability of equitable tolling when a habeas petitioner asserts an actual-innocence claim but cites no extraordinary circumstance that "prevented timely filing."

A. The circuits are deeply divided over this question, and the decision below conflicts with this Court's decision in *Holland*.

The first question presented is whether equitable tolling is even available when a habeas petitioner claims actual innocence but provides no reason justifying the untimely filing. On the Sixth Circuit's side are decisions of the Ninth, Tenth, and Eleventh Circuits. App. 12a, citing *Lee* v. *Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc) (a "petitioner who makes [a credible showing of actual innocence] may pass through the *Schlup* gateway and have his otherwise

time-barred claims heard on the merits"); *Sandoval* v. *Jones*, 447 Fed. Appx. 1, 4–5 (10th Cir. 2011) ("We recognize, of course, that § 2244(d)'s procedural bar does not extend to preclude this court from entertaining claims of actual innocence"); *San Martin* v. *McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011) ("A court also may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned.").

Opposite the Sixth Circuit's conclusion, though absent from its opinion, are the First, Fifth, and Seventh Circuits. *David* v. *Hall*, 318 F.3d 343, 347 (1st Cir. 2003) ("Nothing is changed here by David's claim of actual innocence . . . . [T]he statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence even though Congress clearly knew how to provide such an escape hatch."); *Cousin* v. *Lensin*, 310 F.3d 843, 849 (5th Cir. 2002) (claims of innocence do not justify equitable tolling of § 2244(d)'s limitations period); *Escamilla* v. *Jungwirth*, 426 F.3d 868, 871–72 (7th Cir. 2005) ("Petitioners claiming to be innocent . . . must meet the statutory requirement of timely action.").

Thus, depending on whether his incarceration is in the Sixth, Ninth, Tenth, or Eleventh Circuits, on the one hand, or the First, Fifth, or Seventh Circuits, on the other, a habeas petition claiming both actual innocence and invoking equitable tolling will experience a different result.

It is also difficult to reconcile the Sixth Circuit's conclusion with *Holland*, though the Sixth Circuit strove mightily to do so. App. 14a–18a. *Holland* "made clear" that a petitioner is entitled to equitable tolling only if he shows "'that some extraordinary circumstance stood in his way *and prevented timely filing*.'" 130 S. Ct. at 2562, quoting *Pace*, 544 U.S. at 418 (emphasis added). An actual-innocence claim does not prevent timely filing. Certiorari is warranted.

B. A habeas petitioner claiming actual innocence must act promptly to assert that claim.

The answer to the first question presented is dictated by plain, statutory language. One of Congress's primary purposes for adopting AEDPA was to "compel habeas petitions to be filed promptly after conviction and direct review, to limit their number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances." *David*, 318 F.3d at 346 (citing 28 U.S.C. § 2244(d)(1)(A)–(D); H.R. Rep. No. 104–518, at 111 (1996)). "To bypass these restrictions for reasons other than those given in the statute could be defended, if at all, only for the most exigent reasons." *Id*.; accord *Holland*, 130 S. Ct. at 2560 (§ 2244(d) is subject to equitable tolling only in "appropriate cases"). Indeed, this Court has generally disallowed the actual-innocence rubric as an *independent* ground for habeas relief absent additional extraordinary circumstances, such as a capital case. See *Herrera* v. *Collins*, 506 U.S. 390, 417 (1993).

Although this Court in *Holland* recognized that AEDPA's limitation periods may be generally subject

to equitable tolling, such tolling should not extend to an actual-innocence claim based on new evidence. That is because § 2244(d)(1)(D) already accounts for such a claim. As noted above, AEDPA's one-year limitations period does not begin to run until "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). If a habeas petitioner can assert equitable tolling, it renders § 2244(d)(1)(D) a nullity.

Significantly, § 2244(d)(1)(D)'s discovery rule allows for claims of innocence where new evidence (such as DNA) does not materialize for many years after conviction. But by requiring petitioners to bring such claims within one year after the discovery, § 2244(d)(1)(D) promotes the public's interest in the prompt assertion of habeas claims, an interest that grows over time and aligns entirely with the prisoner's interest. Ordinarily, a habeas grant leaves the state free to retry the petitioner. But that task becomes difficult to impossible "as memories fade, evidence disperses and witnesses disappear." *David*, 318 F.3d at 348. That is particularly true here, where Michigan secured Perkins' conviction more than a decade ago.

In other words, § 2244(d)(1)(D) opens the habeas filing window when a petitioner *could not have filed* his petition earlier based on the unavailability of exculpatory evidence. But "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." *David*, 318 F.3d at 348. As Judge Easterbrook put it, although § 2244 "leaves some (limited) room for equitable tolling, courts cannot alter the rules laid down in the

text." *Escamilla*, 426 F.3d at 872 (citation omitted). "Section 2244(d) has a rule for when new factual discoveries provide a fresh period for litigation; unless that standard is met, a contention that the new discoveries add up to actual innocence is unavailing. Prisoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action." *Id.*

Notably, § 2244(d) is not the only way that Congress addressed the issue of actual-innocence claims based on newly discovered evidence. Under 28 U.S.C. § 2244(b)(2)(B), Congress lifted AEDPA's prohibition on successive petitions where facts underlying a new claim would establish by clear and convincing evidence that a reasonable juror would not have found him guilty of the underlying offense. In other words, there is no need for the courts to act in equity to provide relief for "actually innocent" habeas petitioners; Congress comprehensively dealt with the issue in § 2244. And Congress's intentional use of the actual-innocence concept in other AEDPA provisions creates a negative inference that Congress did not intend there to be an actual-innocence exception to § 2244(d). This Court should grant the petition and so hold.

II. The petition should be granted to resolve a deep and mature circuit conflict regarding the need to show reasonable diligence as a prerequisite to equitably toll AEDPA's limitations period when asserting an actual-innocence claim.

A. The Sixth Circuit's refusal to hold petitioners claiming actual innocence to a "due diligence" standard deepens an already mature circuit conflict.

The second question presented is whether equitable tolling of AEDPA's limitations period requires a habeas petitioner to show reasonable diligence. In considering this question, the Sixth Circuit recognized "two tracks of Supreme Court jurisprudence in tension with each other." App. 16a. As the Sixth Circuit explained, cases like *Holland* and *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005), "indicate that those seeking equitable tolling must, in general, pursue their claims with reasonable diligence." App. 16a. But a case like *House* v. *Bell*, 547 U.S. 518 (2006), "consider[s] actual innocence as a gateway to seek review of claims otherwise barred by procedural default, yet do not impose additional requirements."[2] The Sixth Circuit resolved these two tracks in favor of jettisoning a due-diligence requirement when a habeas petitioner claims actual innocence. App. 16a.

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[2] The Sixth Circuit opinion erroneously refers to *House* v. *Bell* as two separate cases standing for the same proposition, i.e., the cases of *House* and *Bell*. App. 16a.

The Sixth Circuit supported its conclusion with citations to three post-*Holland* decisions. App. 19a–20a. In *Lopez* v. *Trani*, 628 F.3d 1228, 1230–31 (10th Cir. 1010), the Tenth Circuit held that "[i]n the equitable tolling context . . . a sufficiently supported claim of actual innocence creates an exception to procedural barriers for brining constitutional claims, regardless of whether the petitioner demonstrates cause for the failure to bring these claims forward earlier." App. 19a–20a.

Similarly, the Eleventh Circuit, acknowledging *Holland*, "distinguished between equitable tolling based on reasonable diligence and extraordinary circumstances, and equitable tolling based on actual innocence." App. 19a, citing *San Martin* v. *McNeil*, 633 F.3d 1257, 1267–68 (11th Cir. 2011). The Eleventh Circuit said that a "court also may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned." App. 19a, citing *San Martin*, 633 F.3d at 1267–68. The Ninth Circuit has made the same point. App. 19a, citing *Lee* v. *Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc) ("As with equitable tolling based on diligence and extraordinary circumstances, we conclude that Congress intended for the actual innocence exception to apply to AEDPA's statute of limitations").

The Sixth Circuit described the circuits on this issue as "mostly" "in agreement." App. 19a. But the court could make that claim only by looking to post-*Holland* law. App. 19a–20a. The Sixth Circuit's narrow

view of the relevant precedents does not account for the fact that those circuits that require reasonable diligence to invoke equitable tolling based on actual innocence would likely view their precedents as *strengthened*, not diminished, following *Holland*'s reasonable-diligence holding.

For example, in *Flanders* v. *Graves*, 299 F.3d 974 (8th Cir. 2002), a habeas petitioner similarly filed a late petition and invoked actual innocence claim as the basis for equitable tolling. The Eighth Circuit held that a petitioner claiming equitable tolling of § 2244's limitation period based on an actual-innocence claim must show "that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations." *Id.* at 978.[3] There is no reason to think the Eighth Circuit would change its mind in light of *Holland*.

The Seventh Circuit, in *Gildon* v. *Brown*, 384 F.3d 887 (7th Cir. 2004), followed the Eighth Circuit's decision. *Id.* at 887 ("We find the Eighth Circuit's analysis of this issue in *Flanders* v. *Graves*, to be persuasive."). See also *Miller* v. *New Jersey State Dep't of Corrections*, 145 F.3d 616, 618–19 (3d Cir. 1998) (in a case where the court did not describe the nature of the petitioner's habeas claim, the Third Circuit expressly held that equitable tolling of § 2244 requires proof that petitioner "exercised reasonable diligence in investigating and bringing the claims").

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[3] While the court declined to say that actual innocence can *never* be relevant to equitable tolling, *id.*, it limited such circumstances to those beyond the habeas petitioner's control, *id.* But in those circumstances, § 2244(d)(1)(D) would toll the limitations period and render equitable tolling unnecessary anyway.

In light of these conflicting circuit decisions, a habeas petition claiming both actual innocence and invoking equitable tolling will experience a different result depending on whether his incarceration is in the Sixth, Ninth, Tenth, or Eleventh Circuits, on the one hand, and the Third, Seventh, and Eighth Circuits, on the other hand. And all of the decisions recognizing an actual-innocence exception to the due-diligence requirement appear to conflict directly with this Court's admonition in *Holland*. The importance of the question presented and the uncertainty in the law that the split of authority creates counsel strongly in favor of granting the petition.

B. A habeas petitioner invoking equitable tolling must always prove reasonable diligence, even when asserting an actual-innocence claim.

On the merits, the Sixth Circuit's decision failed to wrestle with the tough question: there was no reason for Congress to create a *diligence*-based discovery rule for claims of actual innocence in § 2244(d)(1)(D) if a petitioner could simply circumvent the diligence requirement by invoking equity.

As this Court has held in the context of tolling civil-rights limitation periods, "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." *Baldwin County Welcome Ctr.* v. *Brown*, 147 U.S. 147, 151 (1984). That holding is consistent with the Court's recent statement in *Holland*; in fact, it is the prerequisite for equitably tolling all other AEDPA claims. See, e.g., *Whitley* v. *Senkowski*, 567 F. Supp. 2d 490, 496 (S.D. N.Y., 2008).

But if there is any doubt about whether an actual-innocence claim should create an exception to this diligence requirement in the habeas context, it is resolved by the statutory language. That is because the statute creates a one-year limitations period for the discovery of new evidence that runs from the date the evidence "could have been discovered through the exercise of due diligence." It makes no sense to create an equitable exception that negates the very precondition that Congress required for relief.

The Sixth Circuit did not address this plain-language problem. Instead, it articulated three other justifications for an unlimited equitable-tolling rule. Not one holds up under scrutiny.

First, the panel was wrong in assuming that there is a "tension" between *Holland*'s diligence requirement and the *House* v. *Bell* line of cases, which consider actual innocence as a "gateway" to review procedurally barred claims without imposing additional requirements. App. 16a. The reality is that the petitioners in the *House* line of cases diligently pursued their actual-innocence claims.

In contrast here, Perkins sat for over a decade on the evidence he now says establishes his innocence. Perkins' sister signed the first affidavit purportedly supporting Perkins' claim of actual innocence on January 30, 1997. Ronda Hudson Aff., App. 54a–55a. Perkins admits that her testimony was known to him at the time of trial. Perkins obtained his second affidavit on March 16, 1999. Desmond Louis Aff., App. 50a–53a. Perkins obtained a third affidavit, consistent with his sister's 1997 affidavit, on July 16, 2002. Linda Fleming Aff., App. 48a–49a. But Perkins did not file

his habeas petition until June 13, 2008, 11 years after he obtained his sister's affidavit, and six years after he obtained the final affidavit.

Second, the Sixth Circuit was wrong to assume that requiring Perkins to act diligently before allowing him to invoke equity creates an "absurd result." App. 17a. The panel said that it was "unclear" why equity would allow an actually-innocent prisoner to overcome a procedural bar without showing more, while an untimely habeas petitioner would have to show due diligence. App. 17a. But the answer lies in § 2244(d)(1)(D)'s text, which specifically imports traditional equitable principles by requiring diligence.

In the Supreme Court cases on which the panel relied, App. 19–20a, the prisoners seeking to overcome a procedural bar had all filed timely habeas petitions. Those prisoners had already established due diligence. The Sixth Circuit did not cite a single case where the prisoner waited 11 years to unveil his "evidence" supporting equitable relief. Equity principles do not allow Perkins to sit on his rights for a decade before asking the courts to exercise their equitable powers, and no actually innocent defendant would do so.

Third, this Court's command in *Holland* (a habeas petitioner claiming equitable tolling must always show "that he has been pursuing his rights diligently," 130 S. Ct. at 2562) does not render the gateway-of-actual-innocence theory "redundant." App. 15a. The panel said that "the requirement [of reasonable diligence] has the effect of reducing actual innocence claims to only those which are timely under § 2244(d)(1)(D)." App. 15a. But it is actually the exact opposite: the Sixth Circuit's holding renders § 2244(d)(1)(D)

redundant. There is no reason to dispense with the diligence requirement that Congress required.

Perkins, of course, has never argued that he was diligent in waiting six years from the date of his last affidavit until filing his habeas petition, nor could he. There is no reasonable excuse for such a delay. It is reasonable to expect that a prisoner who has legitimate proof of innocence will petition promptly rather than wait 11 (or even six) years to seek habeas relief. All parties to a habeas proceeding have an interest in resolving claims of innocence as soon as they become known. This Court should vacate the Sixth Circuit's decision and hold that all habeas petitioners invoking equitable tolling must prove reasonable diligence, even those claiming actual innocence.

III. The issues presented are of national importance and require prompt resolution.

The numerous pre- and post-*Holland* Circuit decisions show that both issues presented are recurring and creating unnecessary district-court litigation. The Court should grant the petition and resolve that conflict now.

In opposing rehearing en banc in the Sixth Circuit, Perkins argued that the Circuits' conflict was illusory, because the Circuit decisions in conflict with the Sixth Circuit were issued pre-*Holland*. That argument is a red herring.

Regarding the first issue presented, every Circuit holding that there is no actual-innocence exception to the prevented-timely-filing requirement *assumed* that equitable tolling was available in some circumstances.

David, 318 F.3d 346 ("many circuits have held or assumed that equitable tolling is [generally] available [under § 2244], and we will proceed here on that *arguendo* assumption"); *Escamilla*, 426 F.3d at 872 (§ 2244 "leaves some (limited) room for equitable tolling"); *Cousin*, 310 F.3d at 847–48 ("AEDPA's limitations provision, like any statute of limitations, may be equitably tolled"). The fact that *Holland* recognized the availability of equitable tolling in an AEDPA context would not change the result in these cases.

Regarding the second issue presented, there is nothing in *Holland* that would suggest a diligence requirement is waived simply because a habeas petitioner presents suspect fact affidavits and claims innocence. To the contrary, *Holland* admonishes that a habeas petitioner invoking equitable tolling must show "that he has been pursuing his rights diligently." 130 S. Ct. at 2562. Yet several post-*Holland* Circuits, including the Sixth, refuse to follow *Holland*'s command.

Further delay before resolving the conflict has significant separation-of-power implications. When the judiciary allows untimely habeas petitions based on nothing more than the petitioner's flimsy claims of innocence, the judicial branch abrogates, through equity, the one-year AEDPA limitations period that Congress constructed. Here, for example, Perkins does not point to new DNA or similar evidence that demonstrates his actual innocence. He simply presents old affidavits containing a theory of the case that the jury rejected. This is precisely the kind of stale filing, based on questionable evidence, that Congress sought to keep out of the federal courts altogether when

adopting AEDPA. This Court's intervention is required to enforce that Congressional limit in the Sixth and several other Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: JULY 2012

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AFFIDAVITS

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 12a0062p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FLOYD PERKINS,
Petitioner-Appellant,
v. No. 09-1875
G. MCQUIGGIN,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Michigan at Marquette.
No. 08-00139—Robert Holmes Bell, District Judge.

Argued: October 13, 2011

Decided and Filed: March 1, 2012

Before: MOORE and COLE, Circuit Judges; BECKWITH, District Judge.*

COUNSEL

ARGUED: Allison E. Haedt, JONES DAY, Columbus, Ohio, for Appellant. Mark G. Sands, OFFICE OF THE MICHIGAN ATTORNEY

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* The Honorable Sandra S. Beckwith, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Allison E. Haedt, Chad A. Readler, JONES DAY, Columbus, Ohio, for Appellant. Mark G. Sands, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

COLE, J., delivered the opinion of the court, in which MOORE, J., and BECKWITH, D. J., joined. BECKWITH, D. J. (pp. 16–17), delivered a separate concurring opinion.

OPINION

COLE, Circuit Judge. Floyd Perkins, the petitioner-appellant, asks this Court to determine whether a credible claim of actual innocence, without more, warrants equitable tolling of AEDPA's statute of limitations. This Court has previously held that it does, but the Warden asserts that a recent Supreme Court decision places an additional burden upon such prisoners. Specifically, the Warden argues, that even if a prisoner petitioning for a writ of habeas corpus makes a credible claim of actual innocence, the district court may not assess the merits of the claim unless the prisoner also pursued the writ with reasonable diligence. Because we find that such a reading would render the concept of equitable tolling nugatory, we REVERSE the judgment of the district court and REMAND for proceedings consistent with this opinion.

I. BACKGROUND

On March 4, 1993, Perkins attended a house party in Flint, Michigan, with Damarr Jones and Rodney

Henderson. The three men left the party together, but what happened next is in dispute. Jones testified that as they walked down a wooded trail towards another house party, Perkins pulled out a knife and began stabbing Henderson. Perkins maintains that after leaving the party, the three men went to a store to buy alcohol and cigarettes, but that Henderson and Jones left before Perkins finished paying. He claims that he later saw Jones standing under a streetlight with bloody clothing. Neither Perkins nor Jones disputes that at some point later in the evening, they arrived at another friend's home to play video games.

A Michigan jury convicted Perkins of fatally stabbing Henderson after hearing Jones testify. After exhausting his appeals, Perkins's conviction became final on May 5, 1997. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Perkins needed to file his petition for a writ of habeas corpus by May 5, 1998. *See* 28 U.S.C. § 2244(d)(1)(A). He did not.

On June 13, 2008, Perkins filed his petition for a writ of habeas corpus in the district court, raising sufficiency of the evidence, jury instruction, trial procedure, prosecutorial misconduct, and ineffective assistance of counsel claims of error. The magistrate judge recommended the petition be denied as barred by the statute of limitations. Perkins objected, arguing that the petition should be governed by AEDPA's "new evidence" statute of limitations, which extends the statute of limitations to one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

In support of this objection, Perkins introduced three previously unpresented affidavits that alluded to his innocence and to the guilt of Jones, the prosecution's eyewitness. An affidavit from Perkins's sister, Ronda Hudson, stated that the affiant heard that Jones had bragged about stabbing Henderson and taking his clothes to the cleaners after the murder. An affidavit from Demond Louis, the younger brother of one of Perkins's friends, stated that Jones admitted, on the night of the murder, to killing Henderson. Louis also noticed Jones wearing orange shoes, orange pants, and a colorful shirt, and that there was blood on his shoes and pants. Finally, an affidavit from Linda Fleming, a dry-cleaning clerk, stated that a man matching Jones's description came in around the date of the murder wanting to know if blood stains could be removed from clothing that matched the description given in Louis's affidavit.

These affidavits were signed on January 30, 1997, March 16, 1999, and July 16, 2002, respectively. AEDPA's "new evidence" statute of limitations expired on July 16, 2003, one year after the last affidavit was signed. Perkins filed the instant petition in 2008, almost five years after the statute of limitations had run. Perkins, drawing upon this Court's precedent, requested that AEDPA's statute of limitations be equitably tolled because he is actually innocent of murdering Henderson. The district court denied the request because Perkins's new evidence was not of the sort needed to pursue an actual innocence claim. "His alleged newly discovered evidence was substantially available to him at trial" and the evidence pointed to the same theory that Perkins had already

unsuccessfully argued at trial: that the prosecution's lead witness was framing him.

The district court went further, and found that even if Perkins had put forth the type of evidence that would satisfy the actual innocence standard, he had not pursued his claims with reasonable diligence. Drawing upon the Supreme Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the district court determined that a petitioner who seeks to equitably toll a statute of limitations must demonstrate that he has been diligent in pursuing his rights. Perkins, however, waited almost six years after the last affidavit was signed to file his petition in the district court. On June 18, 2009, the district court adopted the magistrate judge's report, denied Perkins's petition for relief, and denied Perkins a certificate of appealability to appeal the judgment to this Court.

Perkins filed a motion requesting a certificate of appealability with this Court on September 14, 2009. On February 24, 2010, this Court, finding that "jurists of reason could debate the district court's conclusion that reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling," granted the certificate of appealability request. The certificate of appealability identified this issue alone for review. This appeal followed.

II. ANALYSIS

The district court's dismissal of a petition for a writ of habeas corpus for failing to comply with 28 U.S.C. § 2244's statute of limitations is reviewed de novo. *Cook v. Stegall*, 295 F.3d 517, 519 (6th Cir. 2002). Perkins asserts that the district court improperly assessed his

actual innocence claim for purposes of tolling AEDPA's statute of limitations, and that the district court erroneously assumed that a petitioner with a credible claim of actual innocence must additionally prove that he acted with reasonable diligence for such tolling to occur.

A. Perkins's claim of actual innocence

For Perkins to have his habeas petition heard on the merits in federal court, he must first persuade the district court that AEDPA's statute of limitations, which has already run, should be equitably tolled in his favor. To do this, he must show that he is factually innocent of killing Henderson, not just that there was insufficient evidence to convict him. The district court stated that Perkins's delay in filing his petition precluded further review. It also found that Perkins's new evidence was not of the sort needed to pursue a claim of actual innocence, though its analysis on this point was limited to two sentences. We cannot say that the district court's analysis on this issue is a sufficient basis on which to rest our review, such that we need not reach the issue specified in the certificate of appealability.

If a state prisoner's habeas petition is denied in federal district court, "the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b). The certificate of appealability may be issued only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If the district court's denial of habeas relief is on procedural grounds, the petitioner must show that "jurists of

reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The certificate of appealability issued to Perkins identified only the issue of whether reasonable diligence is a prerequisite for equitably tolling AEDPA's statute of limitations for review.

Our review of a petitioner's § 2254 motion is limited to those issues specified in the certificate of appealability. *Harris v. Haeberlin*, 526 F.3d 903, 908 n.1 (6th Cir. 2008); s*ee also Willis v. Jones*, 329 F. App'x 7, 12 (6th Cir. 2009) ("[A certificate of appealability] only vests jurisdiction to consider issues specified in the certificate."). Close to half of Perkins's opening brief is dedicated to proving that he is innocent. Perkins asserts that we should consider his actual innocence claim because it is "part and parcel" of his overall tolling claim. *Calvert v. Wilson*, 288 F.3d 823, 838 n.4 (6th Cir. 2002) (Cole, J., concurring). A closer reading of *Calvert* belies this argument. In *Calvert,* we reviewed a claim not expressly granted in the certificate of appealability because the substantive argument, whether the district court's error was harmless, could not be analyzed without assessing whether the respondent waived the argument. *Id.* ("This [certificate of appealability] argument clearly lacks merit, as the propriety of considering harmless error is certainly part and parcel of Calvert's Confrontation Clause claim.").

Perkins asserts, without more, that the merits of the actual innocence claim are probative as to other

issues in this appeal. We do not agree. Perkins's innocence has no bearing on the reasonable diligence question, the only question certified by the certificate of appealability. The actual innocence claim is not "part and parcel" of the reasonable diligence question, and only a review of the latter is before us.

B. Actual innocence as a valid basis for equitable tolling

AEDPA's statutes of limitation prescribe when state prisoners may apply for writs of habeas corpus in federal court. The statutes of limitation are not jurisdictional, and do not require courts to dismiss claims as soon as the "clock has run." *Day v. McDonough*, 547 U.S. 198, 208 (2006). In *Souter v. Jones*, we held that "where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying constitutional claims." 395 F.3d 577, 602 (6th Cir. 2005) This "gateway actual innocence claim" does not require the granting of the writ, but instead permits the petitioner to present his original habeas petition as if he had not filed it late. *Id.* at 596.

The Warden asks us to reconsider *Souter*'s holding that actual innocence is a valid basis for equitably tolling AEDPA's statute of limitations in light of the Supreme Court's recent decision in *Holland v. Florida*, 130 S. Ct. 2549 (2010). Sixth Circuit Rule 206(c) requires reported panel opinions to be binding on subsequent panels absent en banc review or when "an inconsistent decision of the United States Supreme

Court requires modification of the earlier panel decision." *United States v. Lucido*, 612 F.3d 871, 876 (6th Cir. 2010) (internal quotation marks and citations omitted). A close reading of *Holland* confirms that *Souter* is still binding on this Court.

In *Holland*, the petitioner repeatedly attempted to contact his attorney to ensure that his habeas petition would be filed in time. 130 S. Ct. at 2559. His attorney failed to do so, and the district court and the Eleventh Circuit Court of Appeals both found that "the facts did not warrant equitable tolling and that consequently Holland's petition was untimely." *Id.* Although the petition for certiorari specifically addressed the professional misconduct issue, the Supreme Court could not resolve that issue without first resolving whether the ineffective assistance of the petitioner's attorney warranted equitable tolling of AEDPA's statute of limitations.

The Warden claims that the Supreme Court's decision in *Holland* is the type of inconsistent opinion that justifies revisiting our decision in *Souter*. The Warden asserts that AEDPA's statute of limitations already includes actual innocence claims when two different considerations are taken into account. First, when a new factual predicate for a habeas claim is discovered, the petitioner has an additional year to present his petition, even if the original one year period has run. 28 U.S.C. § 2244(d)(1)(D) ("The limitation period shall run from . . . the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."). Next, claims of actual innocence must be based on "new reliable evidence." *Schlup v. Delo*, 513

U.S. 298, 324 (1995). Taken together, the Warden argues that Congress must have contemplated actual innocence claims when it drafted this section.

This argument is unpersuasive. The Supreme Court has repeatedly cautioned against finding that non-jurisdictional federal statutes of limitation *are not* subject to equitable tolling, absent clear congressional command. *Holland*, 130 S. Ct. at 2560. Even if a statute were to suggest that equitable tolling is inapplicable, such statutory implications do not displace the courts' equitable authority; such displacement should only occur when it is clear that Congress intended to do so. *Id.* The inference of congressional intent that the Warden urges is not the sort of "clearest command" that the Supreme Court requires to displace equitable authority. *See Holland*, 130 S. Ct. at 2560- 61.

The *Holland* Court identified two instances in which the presumption for equitable tolling has been overcome. *Id.* at 2561 (citing *United States v. Brockamp*, 519 U.S. 347 (1997); *United States v. Beggerly*, 524 U.S. 38 (1998)). In *Brockamp*, taxpayers sought federal tax refunds several years after the Internal Revenue Code's statute of limitations permitted such requests. *Brockamp*, 519 U.S. at 348. The IRC's "unusually emphatic" language that "reiterate[d] its limitations several times in several different ways" made clear that Congress truly did not intend for taxpayers to be able to seek refunds after the applicable period expired. *Id.* at 350-51. In *Beggerly*, a landowner's successor-in-interest sought to quiet title to property after the Quiet Title Act's ("QTA") twelve-year limitation period had run. 524

U.S. at 41-42. The Supreme Court found the nature of the QTA's time period to be "unusually generous" and that landowners needed a firm statute of limitations in quiet title actions. *Id.* at 48-49. None of the concerns the Supreme Court considered in *Brockamp* or *Beggerly*—emphasis in language, generosity of limitations periods, or prejudice to opposing parties—are implicated when considering whether to subject AEDPA's statute of limitations to equitable tolling.

Simply put, nothing in *Holland* calls our analysis in *Souter* into question. "While it is true that Congress included an actual innocence exception to the procedural bars on successive habeas petitions and evidentiary hearings but not to the one-year limitations period, that does not give rise to the negative implication that the absence of an exception was intended." *Souter*, 395 F.3d at 598. Indeed, actual innocence as a basis for equitable tolling of a statute of limitation was firmly part of the post-conviction relief jurisprudence when Congress enacted AEDPA, and there is a presumption that "Congress legislates against the background of existing jurisprudence unless it specifically negates that jurisprudence." *Id.* (citing *Young v. United States*, 535 U.S. 43, 49-50 (2002)). The Warden provides no reason why this presumption should be upset. "[L]ike all 11 Courts of Appeals that have considered the question, [the Supreme Court held] that [AEDPA] is subject to equitable tolling in appropriate cases." *Holland*, 130 S. Ct. at 2560. *Holland* does not indicate that a credible claim of actual innocence is not such an "appropriate" case without a series of illogical inferential leaps.

The majority of other circuits that have considered the actual innocence gateway post-*Holland* agree.[1] *See Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc) ("[A] petitioner who makes [a credible showing of actual innocence] may pass through the *Schlup* gateway and have his otherwise time-barred claims heard on the merits."); *Sandoval v. Jones*, 447 F. App'x 1, 4-5 (10th Cir. 2011) ("We recognize, of course, that § 2244(d)'s procedural bar does not extend to preclude this court from entertaining claims of actual innocence."); *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011) ("A court also may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned.") (internal quotation

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[1] The Fifth Circuit held, post-*Holland*, that claims of actual innocence may not toll AEDPA's statute of limitations. *Henderson v. Thaler*, 626 F.3d 773 (5th Cir. 2010). *Henderson*, however, did not address factual innocence, but innocence from a sentence of death. It also did not analyze the question anew in light of the Supreme Court's language in *Holland*. Instead, the *Henderson* court cited to a 2000 case that purportedly held there to be no actual innocence exception. *Id.* at 780 (citing *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000)). *Felder,* however, held that the claim *of the petitioner in that specific case* was not so "rare and exceptional" as to warrant equitable tolling, since "many prisoners maintain they are innocent." *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). In a footnote, the *Felder* court even stated that "[the petitioner] has not made a *showing* of actual innocence . . . ." *Id.* at 171 n.8 (emphasis in original). The *Felder* court did not go so far as to state that credible claims of actual innocence may *never* equitably toll the statute of limitations. The Fifth Circuit's opinion in *Henderson* at best holds that contesting the applicability of the death penalty as a valid sentence is not a valid basis for equitably tolling AEDPA's statute of limitations.

marks omitted). We joined them. *Turner v. Romanowski*, 409 F. App'x 922, 926 (6th Cir. 2011) ("The actual innocence exception allows for equitable tolling if the petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial.") (internal quotation marks omitted).

The Supreme Court's decision in *Holland* is consistent with our precedent in *Souter*. The Warden cites no language in *Holland* that marks such a departure, and simply rehashes arguments that the respondent made, and that we rejected, in *Souter*. The state's drawing of inferences in both the text of AEDPA and the *Holland* decision runs counter to the Supreme Court's command to hesitate "before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Holland*, 130 S. Ct. at 2562. Ultimately, no language in *Holland* gives us any reason to doubt *Souter*'s continued viability.

C. Reasonable diligence as a precondition to relying on actual innocence

The Warden alternatively argues that *Holland* requires *Souter* to be modified to include a reasonable diligence requirement. In *Holland*, the Supreme Court stated explicitly that "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 2562 (citing *Pace*, 544 U.S. at 418) (internal quotation marks omitted). The Warden argues that even if a credible claim of actual

innocence is a valid basis for equitably tolling AEDPA's statutes of limitation, *Holland* dictates placing the additional burden of proving reasonable diligence on such petitioners. But, the Warden's reading conflicts with another strain of Supreme Court jurisprudence in which petitioners who have procedurally defaulted their claims, though not due to a late filing, may have their claims heard by showing, without more, a credible claim of actual innocence. *See House v. Bell*, 547 U.S. 518 (2006) (default due to waiver of substantive claims in state postconviction proceeding); *Schlup*, 513 U.S. 298 (default due to failure to raise substantive claim on appeal of state postconviction motion); s*ee also In re Davis*, 130 S. Ct. 1 (2009) (mem); *Dretke v. Haley*, 541 U.S. 386 (2004).

Holland's language is seemingly at odds with our decision in *Souter* that allows for a petitioner to have AEDPA's one-year statute of limitations equitably tolled upon a credible claim of actual innocence without a showing of reasonable diligence. *Souter*, 395 F.3d at 601 n.16 ("We decline to adopt the approach . . . which imposes a requirement that the petitioner show . . . that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations.") (internal quotation marks and citation omitted). In that same footnote, we went on to state that, "we decline to impose additional requirements upon a petitioner beyond those which the Supreme Court has set forth in its habeas corpus jurisprudence." *Id.* Analyzed together, the Warden contends that we ought to overrule our prior decision in *Souter* pursuant to Rule 206(c), since *Holland* appears to be an inconsistent Supreme Court opinion on the subject of whether both reasonable diligence and a

credible claim of actual innocence must be presented to equitably toll AEDPA's statutes of limitation.

This conclusion is, like much of habeas jurisprudence, not that simple. Requiring reasonable diligence effectively makes the concept of the actual innocence gateway redundant, since petitioners only seek equitable tolling when they were not reasonably diligent in complying with § 2244(d)(1)(D). We made this point clear in *Souter*:

> The requirement [of reasonable diligence] has the effect of reducing actual innocence claims to only those which are timely under § 2244(d)(1)(D), the new evidence provision. That provision states the one-year limitations period begins to run from the date on which the new factual predicate "could have been discovered through the exercise of due diligence." § 2244(d)(1)(D). . . . [This requirement] would not cover situations as in this case where the petitioner had collected sufficient evidence to demonstrate a credible claim of actual innocence but failed to file within the one-year limitations period.

Id. All credible claims of actual innocence, per *Schlup*, must be based on new reliable evidence. Such evidence implicates the section quoted above. It is only those claims outside of that one-year period that require equitable tolling.

Holland cites *Pace*, 544 U.S. 408, as the basis for its conclusion that "a petitioner is entitled to equitable

tolling only if he shows . . . that he has been pursuing his rights diligently . . . ." *Holland*, 130 S. Ct. at 2562 (internal quotation marks omitted). In *Pace*, the Supreme Court decided that the petitioner could not equitably toll AEDPA's statute of limitations because he did not advance "his claims within a reasonable time of their availability" and he sat "on his rights for years" before filing his state postconviction relief application. *Pace*, 544 U.S. at 419. But, neither *Holland* nor *Pace* involved claims of actual innocence, and so requiring reasonable diligence in those situations does not trigger the internal redundancy we described in *Souter*. In *Pace*, the petitioner requested equitable tolling because "state law and [federal] exhaustion law created a trap . . . ." *Pace*, 544 U.S. at 418. In *Holland*, the claim for equitable tolling centered around attorney error. *Holland*, 130 S. Ct. at 2563. In fact, the Supreme Court has never required reasonable diligence to be shown when seeking equitable tolling due to actual innocence.

This puts two tracks of Supreme Court jurisprudence in tension with each other. Cases like *Holland* and *Pace* indicate that those seeking equitable tolling must, in general, pursue their claims with reasonable diligence. Cases like *House* and *Bell* consider actual innocence as a gateway to seek review of claims otherwise barred by procedural default, yet do not impose additional requirements. Resolving this tension requires us either to treat all equitable tolling cases the same, regardless of the presence of an actual innocence claim, or to treat all actual innocence claims the same, regardless of the reason for the procedural default. Given the Supreme Court's rich jurisprudence protecting those that may be wrongfully incarcerated,

we adopt the latter view. *See, e.g.*, *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

Adopting the Warden's interpretation of *Holland* would permit an absurd result: petitioners could seek post-conviction review, even if their claim is otherwise procedurally defaulted, if they can make a credible showing of actual innocence and the basis of their default is not the statute of limitations. If the default is based on the statute of limitations, then such petitioners would also need to show reasonable diligence in order to seek review. The Warden makes no argument as to why such disparate standards ought to be applied based on the nature of the procedural default, which makes this interpretation troubling. As we stated in *Souter*, when considering whether actual innocence claims ought to be analyzed in a similar light post-AEDPA, "[a]bsent evidence on Congress's contrary intent, there is no articulable reason for treating habeas claims barred by the federal statute of limitations differently." *Souter*, 395 F.3d at 599. It is unclear why equity permits an actually innocent petitioner to pursue his petition if his default is based on state court exhaustion principles, but that same petitioner could not do so without proving reasonable diligence if the statute of limitations is the basis of default. There is little reason to believe that the Supreme Court values statutes of limitations over other procedural bars in this way. The more natural reading, in line with the Supreme Court's precedent, is

that all credible actual innocence claims are treated the same.

Congress passed AEDPA to streamline the federal habeas review process "without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law . . . ." *Holland*, 130 S. Ct. at 2562. Such prior law ensured that those who are actually innocent should be granted the ability to pursue postconviction relief regardless of procedural default. *See Schlup*, 513 U.S. at 325 ("Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."); *Sawyer v. Whitney*, 505 U.S. 333, 351 (1992) (Blackmun, J., concurring) ("[The Supreme Court] consistently has acknowledged that exceptions to these rules of unreviewability must exist to prevent violations of fundamental fairness."); *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) ("Federal courts retain the authority to issue the writ . . . .when a constitutional violation probably has caused the conviction of one innocent of the crime."); *Dugger v. Adams*, 489 U.S. 401, 414 (1989) ("[H]abeas review of a defaulted claim is available, even absent cause for default, if the failure to consider the claim would result in a fundamental miscarriage of justice.") (internal quotation marks omitted). If AEDPA is truly meant to be in harmony with pre-AEDPA law in those specific situations in which the Supreme Court is silent, it cannot be inferred that the language in *Holland* places an additional burden of proving reasonable diligence on Perkins.

Almost all other circuit courts have not yet analyzed whether, post-*Holland*, reasonable diligence is a prerequisite for equitably tolling AEDPA's statute of limitations based on a credible claim of actual innocence.[2] Many have come close, and they seem mostly to be in agreement. In *San Martin*, the Eleventh Circuit distinguished between equitable tolling based on reasonable diligence and extraordinary circumstances, and equitable tolling based on actual innocence. 633 F.3d at 1267-68. While acknowledging that *Holland* required reasonable diligence and extraordinary circumstances in order to equitably toll AEDPA's statute of limitations, it noted that "[a] court also may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent remain imprisoned." *Id.* (internal quotation marks omitted). The Ninth Circuit made a similar distinction. *Lee*, 653 F.3d at 934 ("As with equitable tolling based on diligence and extraordinary circumstances, we conclude that Congress intended for the actual innocence exception to apply to AEDPA's statute of limitations.") (citations omitted). The Tenth Circuit

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[2] The Third Circuit recently assumed, in dictum, that a petitioner seeking to toll AEDPA's statute of limitations with a credible claim of actual innocence "would still have the burden of demonstrating . . . reasonable diligence in bringing his claim." *Reed v. Harlow*, 2011 WL 4914869, at *2 n.2 (3d Cir. Oct. 17, 2011). In support of this proposition, that court cites to its previous decision in *Miller v. New Jersey State Department of Corrections*, 145 F.3d 616 (3d Cir. 1998). The petitioner in *Miller*, however, requested equitable tolling because he did not have access to his legal documents, not because he claimed to be innocent. *Miller* does not mention actual innocence.

went further, stating "[i]n the equitable tolling context . . . a sufficiently supported claim of actual innocence creates an exception to procedural barriers for bringing constitutional claims, regardless of whether the petitioner demonstrated cause for the failure to bring these claims forward earlier." *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010).[3]

III. CONCLUSION

Whether Perkins is actually innocent is not for us to decide. To be sure, the standard that he must meet is a high one, and it is only that "rare and extraordinary case" which merits such relief. Instead, this Court is tasked with determining whether petitioners who can make a credible showing of actual innocence must *also* make a showing of reasonable diligence in order to equitably toll AEDPA's statute of limitations and have their claim heard on the merits.

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[3] Because *Lopez* was decided about six months after *Holland*, but fails to cite to *Holland* in the opinion, the weight of this forceful language is somewhat limited. The Ninth Circuit recently questioned whether the phrase "equitable tolling" adequately describes the relief sought by petitioners like Perkins. *Lee*, 653 F.3d at 933-34 n.5. "We note that, in many cases, the phrase 'equitable tolling' is used in describing the use of equitable power to allow the untimely filing of a habeas petition in an actual innocence case. The more accurate characterization is 'equitable exception,' because equitable tolling involves different theoretical underpinnings." *Id.* Although we have used the phrase "equitable tolling" in cases such as *Souter*, the Ninth Circuit's semantic approach is not without merit, as it may assist courts in distinguishing among different standards for equitable relief.

While a number of courts, including the Supreme Court, have held that equitable tolling requires the petitioner to be reasonably diligent in pursuing his rights, none of those decisions analyze whether equitable tolling based on claims of actual innocence must be pursued in the same way. Given the Supreme Court's rich jurisprudence protecting the rights of the wrongfully incarcerated, petitioners who seek equitable tolling based on actual innocence should not be treated in the same way as those seeking equitable tolling because of ineffective assistance of counsel, confusion of filing requirements, or other important, but less compelling reasons. For the foregoing reasons, the judgment of the district court is REVERSED, and the case is REMANDED so that the district court may fully consider whether Perkins asserts a credible claim of actual innocence.

CONCURRENCE

BECKWITH, District Judge, concurring. I write separately to voice a concern that this result not be interpreted to encourage the filing of stale petitions raising dubious claims of actual innocence.

As Justice O'Connor once noted, the principles that inform federal habeas jurisprudence are "finality, federalism, and fairness." *Withrow v. Williams*, 507 U.S. 680, 697 (1993) (concurring in part and dissenting in part). Any equitable exception to the procedural time limits imposed by Congress upon state habeas petitions implicates all three principles. Of course, actual innocence of a crime despite a conviction that has been affirmed on direct review raises fundamental

concerns about fairness to the petitioner, and in some cases the integrity of the judicial system. Thus a credible demonstration of actual innocence has traditionally been treated as sufficient, standing alone, to outweigh the interests of finality and federalism. As this Court recognized in *Souter v. Jones*, 395 F.3d 577, 600 (6th Cir. 2005), an exception to timeliness should be made in "... the rare and extraordinary case where a petitioner can demonstrate a credible claim of actual innocence." Indeed, I am of the view that a credible claim of actual innocence functions as a wholly separate and superceding circumstance that acts as an "equitable exception" to the statute of limitations. See *Lee v. Lampert*, 653 F.3d 929, 933 at n.5 (9th Cir.2011) (en banc).

However, federal habeas jurisprudence also demonstrates that such claims are rare, constituting a "narrow class of cases ... implicating a fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 314-315 (1995). *Schlup* held that in order to credibly claim actual innocence, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id*. at 327 (emphasis added). Moreover, any such **new** evidence presented must be **reliable**, whether it consists of "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence ... that was not presented at trial." *Id*. at 324. Thus a petitioner must present more than an existential possibility of innocence that rests on speculation, or present arguments that simply revisit minor discrepancies in trial testimony or evidence. A petitioner who can present new and reliable evidence of actual innocence under these exacting standards

should be entitled to a review of his claims of constitutional error without the untimeliness of his petition standing in the way. The result reached here should not be interpreted in any way to alter or lower these exacting standards.

I also believe that this result does not preclude any and all consideration of the timeliness of a petitioner's presentation of new evidence. The traditional judicial function of evaluating the credibility of witnesses and the quality and reliability of evidence often involves the consideration of when and how the evidence or witnesses came to light or were discovered by a petitioner. I wish to emphasize that nothing in our opinion should be understood to limit or cabin that traditional function.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 09-1875

FLOYD PERKINS,
Petitioner - Appellant,
v.
G. MCQUIGGIN,
Respondent - Appellee.

FILED
Mar 01, 2012
LEONARD GREEN, Clerk

Before: MOORE and COLE, Circuit Judges;
BECKWITH, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Marquette.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

FLOYD PERKINS,
Petitioner, FILE NO. 2:08-CV-139
v. HON. ROBERT HOLMES BELL
G. McQUIGGIN,
Respondent.
_____/

OPINION ADOPTING REPORT AND RECOMMENDATION

This is a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The matter was referred to the Magistrate Judge, who issued a Report and Recommendation ("R&R"), recommending that this Court deny the petition (docket #7). The matter presently is before the Court on Petitioner's objections to the R&R (docket #8). For the reasons that follow, Petitioner's objections are rejected and the R&R is adopted, as clarified by the instant Opinion.

I.

This Court reviews *de novo* those portions of an R&R to which specific objections are made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). *See also U.S. Fidelity and Guar. Co. v. Thomas Solvent Co.,* 955 F.2d 1085, 1088 (6th Cir. 1992) (noting that a district court conducts *de novo* review of magistrate judge's rulings on dispositive motions); *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995) ("[A] general objection to a magistrate's report, which fails to specify the issues of

contention, does not satisfy the requirement that an objection be filed. The objections must be clear enough to enable the district court to discern those issues that are dispositive and contentious."). The Court may accept, reject or modify any or all of the Magistrate Judge's findings or recommendations. 28 U.S.C. § 636(b)(1).

II.

Petitioner was convicted of murder by a Genesee County jury and was sentenced to life imprisonment on October 27, 1993. The Magistrate Judge recommended that the petition be dismissed because it was barred by the statute of limitations. Petitioner has filed lengthy objections to the R&R. While he does not dispute that his petition is untimely, he contends that he should be entitled to equitable tolling because he has raised a claim of actual innocence.

Petitioner's application is barred by the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1), which became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act, PUB. L. NO. 104-132, 110 STAT. 1214 ("AEDPA"). Section 2244(d)(1) provides:

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

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). The running of the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120 (2001) (limiting the tolling provision to only State, and not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining "properly filed").

The Magistrate Judge concluded that § 2244(d)(1)(A) provides the period of limitation in this case and that the other subsections do not apply to the grounds that Petitioner has raised. Under § 2244(d)(1)(A), the one-year limitation period 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." Petitioner appealed his conviction to the Michigan Court of Appeals and Michigan Supreme Court. The Michigan Supreme Court denied his application on February 3, 1997. Petitioner did not petition for certiorari to the United States Supreme Court. The one-year limitations period, however, did not begin to run until the ninety-day period in which Petitioner could have sought review in the United States Supreme Court had expired. The ninety-day period expired on Monday, May 5, 1997. The statute of limitations began running that date and expired on May 5, 1998. The petition was not filed until 2008, ten years after the statute of limitations expired. The Magistrate Judge concluded, therefore, that, absent equitable tolling, the petition was time-barred. The Magistrate Judge also concluded that equitable tolling was unwarranted on the facts of the case.

Petitioner objects to the R&R, contending that he is entitled to equitable tolling because he has raised a credible claim of actual innocence. He also vaguely suggests that the statute of limitations should be calculated under 28 U.S.C. 2244(d)(1)(D), from the date on which "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."

To the extent Petitioner suggests that the statute of limitations should be calculated under § 2244(d)(1)(D), he puts forward the affidavits of Ronda Hudson, Demond Louis and Linda Fleming, all of whom make averments related to the likelihood that the government's key eyewitness was the actual murderer. (*See* Hudson Aff., docket #8 at 10; Louis Aff.,

docket #6 at 16; Fleming Aff., docket #6-2 at 12.) Those affidavits are unhelpful to Petitioner. First, the affidavit of Ronda Hudson was signed on January 30, 1997, before his conviction became final. Demond Louis' affidavit was signed on March 16, 1999. Linda Fleming's affidavit was signed on July 16, 2002. Even assuming that the affidavits contain newly discovered evidence, a dubious conclusion in light of Petitioner's admitted knowledge about the underlying facts involving these possible witnesses at the time of trial, his petition remains untimely under § 2244(d)(1)(D). Assuming that the statute of limitations began to run as of the date of the latest of these affidavits, July 16, 2002, absent tolling, Petitioner had until July 16, 2003 in which to file his habeas petition. He did not file until June 2008. Moreover, according to the allegations of the amended complaint, Petitioner did not file any post-conviction motion after that date that could have tolled the statute of limitations. As a result, absent equitable tolling, Petitioner's claim is time-barred.

A petitioner bears the burden of showing that he is entitled to equitable tolling. *See Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004); *Jurado v. Burt,* 337 F.3d 638, 642 (6th Cir. 2003); *Griffin v. Rogers*, 308 F.3d 647, 653 (6th Cir. 2002). The Sixth Circuit has repeatedly cautioned that equitable tolling should be applied "sparingly" by this Court. *See Jurado*, 337 F.3d at 642; *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002); *Dunlap*, 250 F.3d at 1008-1009. In *Pace v. DiGuglielmo*, 544 U.S. 408, 418-19 (2005), the Supreme Court held that a petitioner seeking equitable tolling of the habeas statute of limitations has the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some

extraordinary circumstance stood in his way." *Id.* at 418 (applying standard set forth in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

Petitioner generally claims that he is actually innocent of the offenses for which he was convicted. The Sixth Circuit has held that a habeas petitioner who demonstrates a credible claim of actual innocence based on new evidence may, in exceptional circumstances, be entitled to equitable tolling of habeas limitations. *See McCray v. Vasbinder*, 499 F.3d 568, 571 (6th Cir. 2007); *Souter v. Jones*, 395 F.3d 577, 597-98 (6th Cir. 2005). Petitioner, however, fails to present such exceptional circumstances.

To support a claim of actual innocence, a petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him. *Souter*, 395 F.3d at 590, 598-99; *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Allen*, 366 F.3d at 405. A valid claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness account, or critical physical evidence – that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Furthermore, actual innocence means "factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. A petitioner "must produce evidence of innocence so strong that the court can not have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Allen*, 366 F.3d at 405 (internal quotations and citations omitted).

Petitioner has made no such showing in this case. His alleged newly discovered evidence was substantially available to him at trial. While the precise contours of the affidavits may have been new as of 1997, 1999 and 2002, one theory of the defense at trial was that Petitioner was being framed by the prosecution's lead witness, who himself was responsible for the murder.

Moreover, nothing about the Sixth Circuit's recognition of actual innocence as a basis for equitable tolling suggests that such evidence will indefinitely toll the statute of limitations. Instead, The Supreme Court has clearly indicated that equitable tolling, regardless of its basis, always requires the petitioner to demonstrate that he has acted diligently to pursue his rights. *See Pace*, 544 U.S. at 418. Petitioner has failed utterly to demonstrate the necessary diligence in exercising his rights. By July 2002, Petitioner had acquired all of the evidence that he recites to support his actual innocence, yet he waited until June 2008 to bring his claim before any court. Such a delay falls far short of demonstrating the requisite diligence. As a result, Petitioner has failed to demonstrate that his is the "rare and extraordinary case," *Souter*, 395 F.3d at 590, in which evidence of actual innocence should toll the statute of limitations.

III.

Having considered each of Petitioner's objections and finding no error, the Court hereby denies Petitioner's objections and adopts the Report and Recommendation of the Magistrate Judge, as clarified by this Opinion.

Under 28 U.S.C. § 2253(c)(2), the Court also must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner's claims under the *Slack* standard.

Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of petitioner's claims. *Id.*

This Court denied Petitioner's application on the procedural grounds that it was barred by the statute of limitations. Under *Slack*, 529 U.S. at 484, when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only "when the

prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Both showings must be made to warrant the grant of a certificate. *Id.* The Court finds that reasonable jurists could not debate that this Court correctly dismissed each of Petitioner's claims on the procedural ground that the petition is barred by the statute of limitations. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* Therefore, the Court denies Petitioner a certificate of appealability.

A Judgment consistent with this Opinion shall be entered.

Dated: June 18, 2009

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

FLOYD PERKINS #233916,
Petitioner,
v. Case No. 2:08-cv-139
HON. ROBERT HOLMES BELL
G. MCQUIGGIN,
Respondent.
_____/

REPORT AND RECOMMENDATION

Petitioner Floyd Perkins filed this petition for writ of habeas corpus challenging the validity of his state court convictions. Petitioner was convicted pursuant to a guilty plea of murder on August 13, 1993, and was sentenced to life in prison. Petitioner filed an appeal in the Michigan Court of Appeals, which was denied on May 14, 1996. Petitioner's subsequent appeal in the Michigan Supreme Court was denied on February 3, 1997. Petitioner took no further action until October 10, 2000, when he filed a motion for relief from judgment in the Genesee County Circuit Court, which was denied. Petitioner is unsure of the date his motion for relief from judgment was denied. Petitioner did not appeal the denial to either the Michigan Court of Appeals or the Michigan Supreme Court.

Promptly after the filing of a petition for habeas corpus, the court must undertake a preliminary review of the petition to determine whether "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the

district court." Rule 4, RULES GOVERNING § 2254 CASES; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v Perini*, 424 F.2d 134, 141 (6th Cir.), *cert. denied*, 400 U.S. 906 (1970) (district court has the duty to "screen out" petitions that lack merit on their face). After undertaking the review required by Rule 4, the undersigned recommends that Petitioner's application for habeas corpus relief be dismissed with prejudice.

In the opinion of the undersigned, Petitioner's application is barred by the one-year period of limitation provided in 28 U.S.C. § 2244(d)(1), which was enacted on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act , PUB. L. NO. 104-132, 110 STAT. 1214 (AEDPA). Section 2244(d)(1) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

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

28 U.S.C. § 2244(d)(1). The running of the period of limitation is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

In this case, § 2244(d)(1)(A) provides the period of limitation. The other subsections do not apply to the grounds that Petitioner has raised. Under § 2244(d)(1)(A), the one-year limitation period 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." According to Petitioner's application, the Michigan Supreme Court denied his appeal on February 3, 1997. Petitioner did not petition for certiorari to the United States Supreme Court. The one-year limitations period, however, did not begin to run until the ninety-day period in which Petitioner could have sought review in the United States Supreme Court had expired. *See Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The ninety-day period expired on May 5, 1997. Therefore, the statute of

limitations began running on that date and expired on May 5, 1998.

While 28 U.S.C. § 2244(d)(2) provides that the one-year statute of limitations is tolled while a duly filed petition for state collateral review is pending, the tolling provision does not "revive" the limitations period (i.e., restart the clock); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations. Because Petitioner's one-year period expired on May 5, 1998, his motion for relief from judgment filed on October 10, 2000, did not serve to revive the limitations period. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003); *Thomas v. Johnson*, No. 99-3628, 2000 WL 553948, at *2 (6th Cir. Apr. 28, 2000); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000); *see also Rashid v. Khulmann*, 991 F. Supp 254, 259 (S.D. N.Y. 1998); *Whitehead v. Ramirez- Palmer*, No. C 98-3433 VRW PR, 1999 WL 51793, at *1 (N.D. Cal. Feb. 2, 1999).

In summary, the undersigned concludes that Petitioner's claims are barred by the applicable statute of limitations and therefore recommends that this Court dismiss the petition with prejudice.

The Court of Appeals has suggested that a habeas petitioner is entitled to notice and an adequate opportunity to be heard before dismissal of his petition on statute of limitations grounds. *See Scott v. Collins*, 286 F.3d 923, 930 (6th Cir. 2002). This report and recommendation shall serve as notice that the District Court may dismiss Petitioner's application for habeas corpus relief as timebarred. Furthermore, Petitioner's ability to file objections to this report and

recommendation constitutes his opportunity to be heard by the District Judge.

In addition, if Petitioner should choose to appeal this action, I recommend that a certificate of appealability be denied as to each issue raised by Petitioner in this application for habeas corpus relief. Under 28 U.S.C. § 2253(c)(2), the court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A dismissal of Petitioner's action under Rule 4 of the Rules Governing § 2254 Cases is a determination that the habeas action, on its face, lacks sufficient merit to warrant service. It would be highly unlikely for this court to grant a certificate, thus indicating to the Sixth Circuit Court of Appeals that an issue merits review, if the court has already determined that the action is so lacking in merit that service is not warranted. *See Love v. Butler*, 952 F.2d 10 (1st Cir. 1991) (it is "somewhat anomalous" for the court to summarily dismiss under Rule 4 and grant a certificate); *Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990) (requiring reversal where court summarily dismissed under Rule 4 but granted certificate); *Dory v. Commissioner of Correction of the State of New York*, 865 F.2d 44, 46 (2d Cir. 1989) (it was "intrinsically contradictory" to grant a certificate when habeas action does not warrant service under Rule 4); *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983) (issuing certificate would be inconsistent with a summary dismissal).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate

of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. Aug. 27, 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. Aug. 27, 2001). Consequently, the undersigned has examined each of Petitioner's claims under the *Slack* standard.

The undersigned recommends that the court deny Petitioner's application on procedural grounds that it is barred by the statute of limitations. Under *Slack*, 529 U.S. at 484, when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only "when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Both showings must be made to warrant the grant of a certificate. *Id.* The undersigned concludes that reasonable jurists could not debate that each of Petitioner's claims are properly dismissed on the procedural grounds that it is barred by the statute of limitations. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* Therefore, the undersigned recommends that the court deny Petitioner a certificate of appealability.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley

TIMOTHY P. GREELEY

UNITED STATES MAGISTRATE JUDGE

Dated: September 17, 2008

Order

Michigan Supreme Court
Lansing, Michigan

Entered: January 31, 1997

106462

Conrad L. Mallett, Jr.
Chief Justice

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Elizabeth A. Weaver
Marilyn Kelly
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
SC: 106462
COA: 170127
LC: 93-048430-FC

FLOYD GENE PERKINS,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 31, 1997 Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

UNPUBLISHED
May 14,1996

No. 170127
LC No. 93-048430-FC

FLOYD GENE PERKINS,
Defendant-Appellant.

Before: Michael J. Kelly, PJ, and Bandstra and S.B. Miller, * JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). After defendant pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082, he was sentenced to life imprisonment without parole. We affirm.

Defendant first argues that the trial court should have sua sponte instructed the jury, pursuant to CJI2d 5.5 and 5.6, that the testimony of accomplice witness Daman Jones was to be considered "with caution." Assuming that defendant correctly contends Jones was an accomplice for purposes of this argument,[1] we nonetheless conclude that the trial court did not err requiring reversal in failing to give

the sua sponte instructions. Where an omitted instruction is related to the examination of accomplice testimony, the trial court's failure to give the instruction sua sponte will warrant reversal only where the issue of defendant's guilt is closely drawn. *People v Buck,* 197 Mich App 404, 415; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb,* 444 Mich 853; 508 NW2d 502 (1993). The phrase "closely drawn" has been interpreted to include those instances where the trial is nothing more than a mere credibility contest between the defendant and the accomplice. *Id.* However, if the guilt of the defendant is premised upon independent circumstantial evidence and testimony of others, reversal is not warranted. *Id.* at 415-416; *People v Tucker,* 181 Mich App 246, 256; 448 NW2d 811 (1989).

The instant case did not involve a mere credibility contest between defendant and Damarr Jones; the finding that defendant was guilty was supported by the testimony of many others besides Jones. For example, witness Mays testified that, in the past, defendant had told him that, if he was going to kill someone, he would stab the person in the head, similar to the way the murder victim was stabbed in this case. Witness Player testified that, prior to the killing, defendant had told him that "Rodney gots to go" because he was a "snitch," referring to the murder victim. Witness Vaughn testified that defendant also had told him, on more than one occasion and including the day of the murder that he would kill Henderson and also testified that, on the evening of the killing, defendant returned to the house without Henderson and said "[i]t's done." Vaughn also testified that

defendant described to him, over the phone, the way in which the victim had been slain.[2]

Defendant next argues that the trial court failed to properly instruct the jury by not providing pretrial preliminary instructions regarding the presumption of innocence or the prosecutor's burden of proof and by failing to warn the jury that the information against defendant was not any evidence of guilt, but instead telling the jury that "[t]he fact that a defendant is arrested and is on trial is no evidence against him." Because these issues were not the basis of any objection at trial, we review to determine whether relief is necessary to avoid manifest injustice to defendant. *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993).

We find no manifest injustice in this case. The trial court is not required to use the standard criminal jury instructions because they are not officially sanctioned by our Supreme Court. *Buck, supra* at 425-426, and the jury was adequately instructed on the basic principles of law surrounding each of the issues raised by defendant. Further, the fact that these instructions were provided to the jury at the close of proofs rather than prior to the opening of proofs does not constitute manifest injustice. *People v Cramer,* 201 Mich App 590, 595; 507 NW2d 447 (1993).

Finally, defendant argues that the prosecutor's comments regarding defendant's intent to "torture" the victim and that defendant murdered with an "evilness" were improper. Although prosecutors must refrain from denigrating defendants with intemperate and prejudicial remarks, prosecutors are accorded great

latitude regarding their arguments and conduct and they are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case. *People v Bahoda,* 448 Mich 261, 282-283; 531 NW2d 659 (1995). Under these standards, we do not conclude that the prosecutor's statements regarding defendant's intent to "torture" the victim were improper in light of the evidence that there was a total of nineteen stab wounds as well as testimony that defendant told Vaughn and Player that he had thought about stabbing as a means of torturing someone. The prosecutor's comment regarding defendant's "evilness" was not improper, but rather, was an attempt to colorfully summarize the evidence with regard to the motive and intent that the prosecutor believed defendant possessed at the time of the crime. *People v Malone,* 193 Mich App 366, 371; 483 NW2d 470 (1992), aff'd 445 Mich 369; 518 NW2d 418 (1994); *Buck, supra* at 414-415.

Further, even if the prosecutor's comments could be considered improper, there was no objection raised at trial. A curative instruction, resulting from an objection, could have eliminated any prejudicial effect, and we would not reverse defendant's conviction on this issue even if the prosecutor had acted improperly. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994); *Buck, supra.*

We affirm.

/s/Michael J. Kelly
/s/Richard A. Bandstra
/s/ Stephen B. Miller

1 We note that assigning accomplice status to Jones is inconsistent with defendant's theory at trial, i.e., that he was not involved with the murder at all, with or without an accomplice.

2 We also conclude that counsel's failure to request the cautionary accomplice instruction was not prejudicial to defendant because the issue of defendant's guilt was not closely drawn. *Tucker, supra.*

No. 09-1875

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FLOYD PERKINS,
Petitioner-Appellant,
v.
G. McQUIGGIN,
Respondent-Appellee.

FILED
Apr 26, 2012
LEONARD GREEN, Clerk

ORDER

BEFORE: MOORE and COLE, Circuit Judge; and BECKWITH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* Hon. Sandra S. Beckwith, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

FILE NO. 93-048430-FC

FLOYD G. Perkins, HON. RICHARD B. YUILLE
APPELLANT-DEFENDANT,
vs.
PEOPLE OF THE STATE OF MICHIGAN,
APPELLANT-PLAINTIFF.
_____/

STATE OF MICHIGAN)
) SS: AFFIDAVIT OF FACT
COUNTY OF MONTCALM)

I Linda Fleming do hereby declare · under the penalty of perjury, under my own volition, and without persuasion or threat to my well-being, that the following statement is · true to the best of my knowledge, information, and belief, and can competently testify to such if called as a witness.

On or about March 04, 1993 I was gainfully employed at the Pro-Clean Cleaners located at .the corner of Pierson and Fleming Rd. On the aforementioned date, I was approached by a customer of medium built, light skinned with short hair, and appeared to ·be about 5 foot 9 or 5 foot 10. I was ask if there was anything we could do to remove blood. The customer then presented a pair of pants, being orange in color, with a name brand of damage. The pants had large amounts of blood covering the front left and right sides, with majority of the stains in the thigh area. The

customer then presented a multi-colored cocktail shirt which also had large amounts of blood around the front bottom of the shirt. After inspecting the clothing, I then ask the customer, what had caused him to have so much blood all over his clothing? The customer replied, "I was in a fight."

Ms. Linda Fleming
602 E. Stewart St.
Flint, MI 48505

Subscribed to and sworn before
me 16th day of July 2002
Notary Public, County of Genesee, MI

My commission expires: 1-10-2003

AFFIDAVIT

STATE OF MICHIGAN)
) ss.
COUNTY OF SAGINAW)

I Demond Louis, being of sound mind, would like to state that:

l) On March 4, 1993 I was at the home of Anika Terrell, located on the 5600 block of Marja Avenue in Flint, Michigan.

2) I spent the entire day at this residence and stayed there over night. During the course of this day, later in the eveing, Damarr Jones did arrive. Shortly after Rodney Henderson, Chauncy Vaughn, and Floyd Perkins arrived. After about an hour of being there Jones, Henderson, and Perkins left the residence together.

3) At approximately 11:00pm Damarr Jones did return to this same residence, alone. He/Jones asked to speak to me, at which time we went into the basement. Once in the basement alone with me, Jones bragged, confessing to me that he had just killed someone.

4) I then asked Jones to tell me exactly what he meant by that statement. Once again Jones stated that he had just killed someone. I asked him/Jones who had he killed, and he/Jones replied Rodney. I believed that meant Rodney Henderson, with whom Jones had left with earlier.

5) Concerned and worried I just looked at Jones for a moment. As I looked at him/Jones I noticed that he had blood on his shoes and on the front part of his pants legs. (The clothing he/Jones had on consisted of orange colored shoes and orange pants, with a matching colorful shirt.) The moment I asked Jones what had happened he began to confess that he had stabbed

Rodney (Henderson) in the back, and that he stabbed him repeatedly.

6) After confessing this to me, Damarr Jones told me to keep this information to myself, and that no one other than he and I knew of the incidence, also that I was the first person that he had told. At that point I told

(1) (continued on next page)

continued...

him/Jones that I would talk to him in the morning. I then went upstairs and left him in the basement alone. I had no idea if something had actully happened to Mr. Henderson or not. Yet I was quite aware that something had occurred, because of all the blood that was on Jones.

7) On March 5,1993 Damarr Jones entered the bedroom on the ground floor of the same residence and awoke me. I'm not sure of the time, but it was in fact early, because everyone else was still sleeping. Jones asked me to go with him. I asked where, and he/Jones told me that he had something he needed to do. Jones had changed clothing. I then dressed and went down into the basement where he/Jones was at. I then observed Jones placing his pair of orange pants into a brown paper bag along with his orange tennis shoes. These items were still blood stained.

8) I then exited the residence along with Jones. We then proceeded to walk two blocks over to a business. I beleve the name of the establishment is Pro-Clean Dry Cleaners, which is located on Pierson Rd/Fleming Rd, in the city of Flint, Michigan.

9) Once in the parking lot I observed Jones placing the orange shoes into the near by dumpster (These were the same shoes he had on with the blood stains and that I saw him stuff into the paper bag.) I asked Jones

why he was throwing the shoes away? He/Jones replied, "could'nt get the stains out last night", I beleve that to mean he tried to clean the blood off himself.
10) Jones then told me to wait outside while he went into the cleaners. He returned shortly. Jones entered the cleaners with his orange pants and came out without them (these are the forementioned blood stained pants of Damarr Jones.)
11) On March 6, 1993. I found out that the body of Rodney Henderson had been found. That he/Rodney Henderson had in fact been murdered. I did
(2) (cont P3)
not come forth with the information I knew, contained herein, because I was young, scared, and did not know what to do. I feared that if I spoke to anyone about what Jones told me as well as the things I observed, that Jones would do to me, what he said he did to Rodney. Yet now as a young man I know that it was morally wrong for me to withhold this information. I know the information I've held for so long should be and needs to be told as truthfully and as accurately as I can recall it, because it is the right thing to do. I've since turned my life over to <u>My Lord Jesus Christ</u> and the burden of this is weighing heavy on my soul.

* * * * * * * * * * * * * *

The above statements I've made are true and factual to the best of my knowledge and recollection. I make this statements of my own free will, with no duress or coercion whatsoever. I've not been threatened, nor harmed nor enticed to make this statement, nor have I been promised anything in return for my confession of these facts.

I stand by these statements, and willing to testify to these statements under oath in any court of law within the United States of America.

Demond Louis 3-16-99

Subscribed and sworn to me, this 16 day of March, 1999, …in and for … County. State of Michigan. Notary Public. My commission expires Sept 30, 2001. Acting in Saginaw County.

STATE OF MICHIGAN
IN THE COURT FOR THE COUNTY OF GENESEE

STATE OF MICHIGAN)
) ss: Affidavit of Ronda Hudson
COUNTY OF GENESEE)

I, Ronda Hudson, being of sound mind would like to state that:

1. On the second weekend of the second week of March 1993 I did receive information from Louis Ford.

2. And that he did inform me that he had been at a residence in which Damarr (Jones) bragged that he had stabbed Rodney (Henderson) and had taken his clothes to the cleaners and then he laughed about it.

3. That after receiving this information I did in fact ask Louis if he had told this to the police, and would he testify to what he had been told. And that he stated that he would not talk to the police nor testify, but felt I should have the information.

4. After receiving this information I did pass it along to Floyd Perkins.

5. I did check the cleaners surrounding my neighborhood and in the third cleaners I found a clerk that did in fact see Damarr Jones come into the cleaners and that he (Damarr Jones) had clothing covered in blood.

6. The above statements are true and factual to the best of my knowledge. I make these statements of my own free will and under no duress or coercion whatsoever. Nor have I been promised anything in return for my confession of truth.

Signature

Subscribed and Sworn to before me this 30th day of January 1997. Notary Public, County of Genesee Michigan.

My commission expires: 8/22/98
Cristi L. Taylor